Supreme Court of the United States

OCTOBER TERM, 1970

No. 322

JOSEPH McKEIVER AND EDWARD TERRY,
Appellants,

v.

PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

INDEX

	Page
Chronological List of Relevant Docket Entries	iii
Delinquency Petition Against Joseph McKeiver Filed April 15, 1968	v & vi
Delinquency Petition Against Edward Terry Filed September 4, 1968	vii
Transcript of Proceedings, In the Matter of Joseph McKeiver: Testimony of James Raggio, Witness on Behalf of Prosecution—	
Direct Examination	3
Cross Examination	5

INDEX

Page

Testimony of Anthony Mirarchi, Witness on Behalf of Prosecution—

Direct Examination 8

Cross Examination 9

Re-Direct Examination 11

Testimony of Joseph McKeiver, Defendant—

Direct Examination 12

Cross Examination 13

Adjudication 16

Dispositional Hearing 16

Disposition 17

Transcript of Proceedings, In the Matter of Edward Terry:

Testimony of Police Officer Sweeney, Witness on Behalf of Prosecution—

Direct Examination 21

Cross Examination 22

Testimony of Robert Gooby, Witness on Behalf of Defendant—

Direct Examination 25

Testimony of Mrs. Terry, Witness on Behalf of Defendant—

Direct Examination 28

Adjudication 29

Dispositional Hearing 29

Disposition 32

Opinion and Order of Supreme Court of Pennsylvania, Filed May 4, 1970 33

Dissenting Opinion of COHEN, J., Filed May 4, 1970 43

Order of Supreme Court of the United States Noting Probable Jurisdiction, Order Dated June 29, 1970 48

Order of the Supreme Court of the United States Granting Leave for Appellants to Proceed in Forma Pauperis, Order Dated June 29, 1970 49

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 17, 1968—Defendant Joseph McKeiver adjudged delinquent of robbery and larceny and placed on probation.

November 7, 1968—Petition for re-hearing on behalf of Joseph McKeiver filed by Community Legal Services.

February 13, 1969—Petition for re-hearing for Joseph McKeiver based on the failure of the court to allow a jury trial denied.

March 27, 1969—Defendant Edward Terry adjudged delinquent.

April 17, 1969—Certiorari from Superior Court of Pennsylvania filed as to the appeal of Joseph McKeiver.

May 6, 1969—Certiorari from Superior Court of Pennsylvania filed as to the appeal of Edward Terry.

August 19, 1969—Order affirmed by Superior Court as to appeal of Joseph McKeiver.

August 19, 1969—Order affirmed by Superior Court as to appeal of Edward Terry.

September 3, 1969—Appeal to Supreme Court of Pennsylvania filed by Edward Terry.

September 5, 1969—Appeal to Supreme Court of Pennsylvania filed by Joseph McKeiver.

May 15, 1970—Order affirmed by Supreme Court as to appeal of both Edward Terry and Joseph McKeiver. Opinion and dissenting opinions filed.

FORM 1000 ~~9-68~~ Pre.Crr. 5/15/68"A"

State of Pennsylvania } ss.
PHILADELPHIA COUNTY

In the County Court of
Philadelphia
JUVENILE DIVISION

.....Term, 19....

To the Honorable Adrian Bonnelly, P.J.
One of the Judges of the Juvenile Court.

Your petitioner Anthony Cannalongo of
County Court Street, a reputable person, and resident of said
County, respectfully represents that Joseph McKeiver 2320 N. Natrona St.
N. 12-1-52 Bapt.

(State age, color, sex and religion)

now within the County is an alleged delinquent person in this: it is alleged
That Joseph McKeiver did, on or about 4/11/68 at or about 1.55 P.M.,
at or near 3300 W. Diamond Street, rob the complainant, Reggio
James, of articles of personal property. The boy is charged with
Robbery, Larceny, and Receiving Stolen Goods.
(Insert nature of delinquency, and if arrested the charge)

and that the parents or custodians of said child are
William and Asalee
A
Strawberry Mansion

and the following named persons have knowledge of the said delinquency or of the condition of the said child

Your petitioner therefore prays this Honorable Court to inquire into the truth of matters herein contained, and to make such orders in the premises as may seem meet and proper, and your petitioner will ever pray, etc.

Anthony Cannalongo

OVERSIZE PAGE SEE NEXT FRAME
FOR REMAINDER OF PAGE

County, respectfully represents that Joseph McKeiver 2320 N. Natrona St.
N. 12-1-52 Bapt.

(State age, color, sex and religion)

now within the County is an alleged delinquent person in this: it is alleged

That Joseph McKeiver did, on or about 4/11/68 at or about 1.55 P.M., at or near 3300 W. Diamond Street, rob the complainant, Reggie James, of articles of personal property. The boy is charged with Robbery, Larceny, and Receiving Stolen Goods.

(Insert nature of delinquency, and if arrested the charge)

and that the parents or custodians of said child are
William and Asalee

Strawberry Mansion

and the following named persons have knowledge of the said delinquency or of the condition of the said child

Your petitioner therefore prays this Honorable Court to inquire into the truth of matters herein contained, and to make such orders in the premises as may seem meet and proper, and your petitioner will ever pray, etc.

Anthony Cannalongo

STATE OF PENNSYLVANIA, } ss.
PHILADELPHIA COUNTY }

Anthony Cannalongo, being duly sworn, says that the facts set forth in the above petition are true according to the best of his knowledge and belief.

Anthony Cannalongo

Subscribed and sworn to before me this 15th day of April 68

Clerk of the Court

I HEREBY CERTIFY the foregoing to be a true and correct copy of the original as filed of record in this office.

R. Magenise
Clerk of
QUARTER SESSIONS COURT

VI.

4/15/68 C.O. 5/15/68 "A"
Robb., Larc., hSG 12-20-67 R-A 2:00 PM

7-16-68

No. 10124

_____ Term, 19

In the County Court of Philadelphia

JUVENILE DIVISION

IN THE MATTER OF

Joseph McKelver
N. 12-1-52 Bapt.
William & Asalee
2320 N. Natrona St.

131550

AN ALLEGED DELINQUENT CHILD

PETITION

MAY

Continued to 7-16-68 for
hrg. adjudicatory hearing.
Lifted to C.L.S.J.

Continued

C.P.A.
Richard Cih. Atty.

WITNESSES

OCT 17 1968

Adjudged Delinquent Child
Care. PROBATION

Petition

IN THE COUNTY COURT OF PHILADELPHIA
JUVENILE DIVISION

C.C. NO.

FILED 9-4-68

DATE OF OCCURRENCE 19-68-8564 8-31-68

NAME OF ALLEGED DELINQUENT CHILD	ADDRESS (No. & Street) (City & State) (Zip Code)	DATE OF BIRTH
Edward Terry	1741 N. 53rd St. 19131	2-23-54

Your petitioner respectfully represents that the above named juvenile who resides at the above address is a delinquent child in need of care, guidance and control who, on the date set forth, did violate the law of the Commonwealth of Pennsylvania, as follows:

School Unk.

It is alleged that Edward Terry did on or about 8-31-68 at or about 7:05 p.m. in company with others act in a disorderly manner while at or near Parkside and Lindenwood St. strike Officer Swaney [illegible]

The boy is charged with assault and battery on officer and conspiracy.

COMMONWEALTH OF PENNSYLVANIA } ss.
COUNTY OF PHILADELPHIA }

Subscribed and sworn to before me this 4th day of September 19 68

Pro Clerk

I, the petitioner, being duly sworn, say that the facts set forth in the above petition are true according to the best of my information and belief.

Petitioner

	NAME (S)	ADDRESS (ES)
PARENTS OR LEGAL GUARDIANS	Edward (add.?) Caroline Terry	1741 N. 53rd St.
WITNESSES	NAME (S)	ADDRESS (ES) OR POLICE BADGE NO.

YOU HAVE A RIGHT TO HAVE A LAWYER – YOU AND YOUR LAWYER MUST APPEAR AT THE TIME OF HEARING

(Date) (Courtroom)

☒ Case is listed for hearing at 9:00 a.m. on 9-10-68 1 TROT 1ING STREET ☐ You will be notified of hearing date.

74-1 (Rev. 5/66)

JUVENILE'S COPY

VII.

IN THE COUNTY COURT OF PHILADELPHIA

JUVENILE DIVISION

---

[9]

IN THE MATTER OF JOSEPH McKEIVER

No. 131550

Robb., Larc., RSC

Philadelphia, Pa., October 17, 1968

1801 Vine Street
Room D

Before: HON. THEODORE S. GUTOWICZ, J.

PRESENT:

EDWIN D. WOLF, ESQ.,
Assistant District Attorney
RICHARD A. ASH, ESQ.,
Community Legal Services for Defendant

(All Parties Sworn.)

MR. ASH: On this particular case, Your Honor, I was just in the middle of interviewing this boy, I had never seen him before, and I am not ready to proceed with it.

THE COURT: When were you appointed for this case?

MR. ASH: We have an interview in our file. When Community Legal Services was appointed—I have not seen this boy before, I don't take the initial interview, and I of course have to interview the boy on my own right.

THE COURT: Take five minutes out now to interview him.

(A short recess.)

MR. ASH: Your Honor, respectfully, I just discussed this with Mr. Wolf. I think the arresting officers ought to be here, because this is one of these situations where something happened in the park and they drove these boys around, without any lineup or any protection for this boy, and they picked him out when they were being driven around and surveying all the boys in the park. I think they ought to be here.

THE COURT: I don't think the law of lineup applies in this situation.

MR. ASH: Your Honor has ruled, but I am just indicating I would like the police to be here. The reason they are not here is because of this thing, but, on the other hand, since it's going to turn on the issue of credibility between my client, who is a juvenile, and these others, I am going to ask for a jury trial.

THE COURT: I ruled once before. Your motion for jury trial is refused. You filed a petition once before, and I refused it.

Mr. Wolf, what is the position of the Commonwealth?

MR. WOLF: We are ready to proceed, Your Honor. The police officer is not here, as you know, but we do not feel that his presence is necessary.

THE COURT: Fine. Then you proceed with the case. I'm ready to hear it.

MR. WOLF: Thank you.

THE COURT: When was CLS office appointed?

MR. ASH: Your Honor, I can only look at the file. I don't know when the court appointed us, I can tell you—

THE COURT: I don't want to look at the file, so you tell me when you were appointed.

MR. ASH: I don't know, Your Honor.

COURT REPRESENTATIVE: They were referred on 5/15/68.

THE COURT: May 15, 1968. In other words, the court notified CLS of its representation on May 15, 1968?

COURT REPRESENTATIVE: Yes.

THE COURT: All right, then, we are ready.

COMMONWEALTH'S EVIDENCE

BY MR. WOLF: (to James Raggio)

Q. What is your name?

A. James Anthony Raggio.

Q. James, how old are you?

A. 15.

Q. Where do you live?

A. 2514 South Darien Street.

Q. James, we would like you to tell us about the incident which occurred to you in the park, back in April.

A. I was walking—

Q. First, what time of day was this?

A. I was walking on—it was about 1:30, 2 o'clock. I was walking in Fairmount Park, you know, on this reservoir. So there was these kids, they were coming toward us. So we ran down, and there were these other three kids, on bikes. And two kept going, and one stopped, and they wanted money. So I said—

Q. Who was with you?

A. These two boys (indicating).

Q. These two boys were with you?

A. Yes.

Q. How many boys came up to you?

A. Well, three boys on bikes, but I don't remember the exact amount of the other ones.

MR. ASH: Your Honor, I am going to ask that the other two boys be sequestered, because this happened a substantial length of time ago and I would like the testimony to be from the memory of the boys rather than be refreshed from hearing each other testify. So I would ask for sequestration of the boys who are not testifying.

THE COURT: Is there any opposition to that?

MR. WOLF: No, sir.

THE COURT: All right, take the boys out.

(Two boys escorted from the courtroom.)

BY MR. WOLF:

Q. So you were with your two friends. Were you walking or on bicycles?

A. We were walking.

Q. Who came up to you?

A. There were some kids that chased us down from the reservoir, and three kids on bikes, two of them kept on

going and one stopped. They asked for money, and I said, "I don't have any. I only have a quarter and I have to get home with it."

He said, "I want the quarter." And I said, "You can't have it, it's the only quarter I have."

And he said, "Give me the quarter or I'm going to hit you." I said, "You can't have the quarter. Go ahead and hit me, but you can't have the quarter."

So then he hit me, and I gave him the quarter. And some old guy was coming in a car, and he picked us up and took us to the police station, and we told the policeman, and he got him.

Q. Where did he hit you?

A. (Indicating). In the face.

Q. Is that boy in the courtroom today?

MR. ASH: Objection.

A. Yes.

Q. Will you point him out?

THE COURT: Objection overruled.

A. (Pointing).

MR. WOLF: Indicating the young man standing at the bar of the court.

MR. ASH: Your Honor, may the record indicate there is only one boy standing at the bar of the court, and only one boy in the courtroom besides the complainant.

THE COURT: Are there co-defendants in this case?

MR. ASH: Not that I know of.

THE COURT: He is the only defendant.

MR. ASH: He is the only boy at the bar of the court.

THE COURT: All right.

BY MR. WOLF:

Q. When this fellow took you to the police station, do you know what police station you went to?

A. Well, we went to—well, we went to this like post, or something, and there was a man on a horse, and he called up other guys, and we went in a car, and got him. And then—I don't recall, you know, the police station, I didn't know—it was in the park, though.

Q. After you got to the police station, what did you do when you got there?

A. Well, they took our names and everything. And, well, we were just waiting around.

Q. Then what happened?

A. They called the JAD, and he came up and he told us—he asked us. Then the policeman drove us home.

Q. After you were struck and the money was taken from you and the boy rode off on the bike, when was the next time you saw him?

A. The next time I saw him—I saw him ride down the road. But then he told us to get in the car and he said we'd find him.

Q. Who was this?

A. It was a police officer. I don't know his name, though.

Q. He told you to get in the car. Was this at this police station?

A. No, we were still at that police post, and he called the police car up, and it came and took us, and he said, "we'll find him," and I said, "Okay."

Q. So then what happened? You were in the police car and you drove around the park?

A. We drove around, we drove out in the street and everything, you know, down Diamond Street. And we were driving in the park, and then I saw him and I told him it was him.

Q. What did the policeman do?

A. The policeman told him to get in the car. There were two, three cars with us, and he told us to get in the car, and he told him (pointing) to get in the car, and he took him to the police station.

MR. WOLF: Cross examine.

CROSS EXAMINATION

BY MR. ASH:

Q. James, how old are you?

A. 15.

Q. And you go to school?

A. Bishop Neumann.

Q. James, this incident happened between about 1:30 and 2 p.m.?

A. Around there. Maybe 2:30, I don't recall.

Q. Then this man helped you get in contact with the police; is that right?

A. Yes.

Q. Then the police drove you around?

A. Yes.

Q. How much time elapsed between the time that the boy struck you and the time that you pointed out a boy?

A. About 15, 20 minutes.

Q. And you indicated you drove, what, around the park and through Diamond Street?

A. Yes—well, I don't know if it was Diamond. It was a street out in, like out of the park. Maybe it was Diamond Street, I don't know.

Q. There were a lot of boys in that park, weren't there?

A. (Nodding head in the affirmative.)

Q. You have to say Yes or No.

A. Yes.

Q. Had you ever seen the boy that struck you, before this day?

A. No.

Q. And this was the first time you had ever seen him, wasn't it?

A. Yes.

Q. How much time did this incident involve, from the time you first saw this boy until the time he struck you and left you?

A. About five or ten minutes; ten, at the most.

Q. And I assume he was a Negro boy, wasn't he?

A. Yes.

Q. Was he wearing glasses or wasn't he wearing glasses?

A. No, he wasn't wearing glasses.

Q. This incident happened in April, 1968, and you haven't seen that boy since the incident happened, have you?

A. No.

Q. What kind of clothing was that boy wearing, do you remember?

A. I think he was wearing a blue, like sweat shirt, and he was riding a black Italian racer, but I don't know—he had sneakers on.

Q. Are you sure at this time what he was wearing?

A. I'm sure he had a blue sweat shirt on, with a hood on (indicating).

Q. I know about this, you are a very fair and honest boy, and I want you to know that—

THE COURT: Let's keep comments out of the question. You are cross examining.

MR ASH: Certainly.

THE COURT: That is objectionable.

BY MR. ASH:

Q. When the police took you around, there came a time when you pointed a boy out; is that right?

A. That's right, yes.

Q. Was there anything special about the boy you pointed out?

A. Well, there was—well, anyway, the boy I pointed out —there was two other kids with him, and he had to give the bike back to some other kid because it wasn't his, and why I remember him—I couldn't forget him.

Q. Was he riding a bicycle?

A. He was riding a bicycle. He rode away. In fact—

Q. You said something about him having to give the bicycle to somebody else.

A. Yes, because it wasn't his bike.

Q. You don't know, do you?

A. He said, "take this bicycle and give it back to" so and so, I don't know who it was.

Q. Now the boy that's at the bar of the court, looking at him at this point, he is wearing glasses, isn't he?

A. Yes.

Q. Now you stated he was the same boy that you pointed out?

A. Yes.

Q. How are you sure of that?

A. Well, —

Q. Or are you sure of it?

A. I'm sure. I couldn't forget him. I got hit by him, I don't think I could forget him.

Q. So you are indicating to the court that a boy you saw in April, 1968, and you haven't seen until today, you are sure this is the same boy?

A. I'm sure.

Q. Is that what you are saying?

A. Yes.

Q. And you saw that boy for five minutes in April, '68, and you had never seen him before?

A. Well, I saw him in the court when we were in the

police station, I saw him, I saw him for about an hour, because he was just sitting there, waiting for the JAD.

Q. But you haven't seen him since April, 1968, have you?

A. No.

Q. Is there anything special about this boy that makes you remember him?

MR. WOLF: Your Honor, I object.

THE COURT: Sustained.

Mr. Wolf, I have been waiting.

BY MR: ASH:

Q. Now there have been times in your life, haven't there, when you have been absolutely certain of something, and found out later you were wrong? Isn't that a fact?

A. Yes.

MR. ASH: I have no further questions.

THE COURT: Talking to the defendant, now will you take your glasses off and turn around and face the complainant here?

BY THE COURT: (to Witness)

Q. Now I want to ask you a question. Now look at this boy again. Are you positive he's the boy who hit you?

A. Yes.

MR. ASH: Your Honor, I have to take exception to the form of that question, it's a leading question.

THE COURT: You may take an exception. Let it be noted.

BY THE COURT:

Q. You are sure this is the boy that you met in the park?

A. Yes.

Q. And you are sure he is the one that you pointed out to the police?

A. Yes.

THE COURT: All right.

MR. WOLF: I have no further questions of this witness.

BY MR. WOLF: (to Anthony Mirarchi)

Q. What is your name?

A. Anthony Mirarchi.

Q. Where do you live?

A. 2522 South Darien.

Q. How old are you?

A. 13.

Q. Do you remember an incident that happened in the park when you were with James and your other friend?

A. Yes, I do. We were walking up the reservoir, on top, and there was these kids running down, about 20 or 30 of them. We went down the hill. And there was three boys on a bike, walking—riding on the bike. And two other kids went, and the kid stopped, and he wanted our money. We gave it to him but Jimmy, over here (indicating), didn't. So he punched him. So—and he ran, on the bike.

So we went in the cop car, we went after them. We just happened to find this kid, you know. So we thought it was him, so we—so that's it.

Q. Did you give him money?

A. Yes, we gave him a quarter.

Q. Did you yourself give him any money?

A. Yes, yes.

Q. Why did you give him the money?

A. Because he wanted it and we couldn't do anything, because there were about 20 other ones.

Q. Is the boy in court today?

MR. ASH: Objection.

A. Excuse me?

THE COURT: Objection overruled.

BY MR. WOLF:

Q. Is the boy in court today?

A. That got punched?

Q. Yes.

A. Yes, he's right over there (pointing).

Q. No, the boy who took the money.

A. Yes, I think he is.

Q. Who is he?

A. This boy, right here (pointing).

MR. WOLF: Cross examine.

CROSS EXAMINATION

BY MR. ASH:

Q. Anthony, where do you go to school?

A. Stella Maris.

Q. There were three of you together in the park?

A. Yes.

Q. How many boys came up to you?

A. Well, there was about 20 of them in back of us, you know, and about three kids on the bike, but two of them went. So they wanted our money. So somebody went in my pocket and took it out, and went in the other boy's and took it out. But this kid over here (pointing) didn't want to give it to him, and one punched him.

Q. Who asked for the money, do you know?

A. This boy right here (pointing).

Q. Well, were some of the other 20 boys involved in this?

A. No, they weren't.

Q. There were three of you together, and this boy approached you; is that what you are stating?

A. Yes.

Q. And his other two friends had ridden off?

A. Yes.

Q. So he was alone, and the three of you were together?

A. Right.

Q. And you have indicated he asked for money?

A. Yes, he did, he wanted our money. So I gave it to him, but Jimmy, over here, didn't give it to him, so he punched him.

Q. Where did he punch him?

A. In the jaw, right here (indicating).

Q. Had you ever seen this boy before?

A. No, I didn't, except the incident that happened out in Fairmount Park.

Q. How long did that incident take place?

A. It was in April, Holy Thursday day.

Q. How much time was involved in the taking of the money from the three of you?

A. I'd say about a minute.

Q. And then the boy went off?

A. Right.

Q. Did he ride off on a bicycle?

A. Right.

Q. Then, after that, how did you come in contact with the police?

A. This guy was riding in a car and he stopped and he broke it up. So he brought us to the little station. And the cop car went after him, and we caught him.

Q. So you drove around with the police; is that right?

A. Yes.
Q. How long did you drive around, before—
A. About eight minutes, nine minutes.
Q. And you saw a lot of boys, didn't you?
A. Yes.
Q. There were a lot of boys riding on bicycles in the park that day, weren't there?
A. Well, when we were riding we didn't see that many.
Q. But you saw him, didn't you?
A. Yes.
Q. What was the boy wearing on that day, do you remember?
A. No, I don't.
Q. Was he wearing glasses?
A. I don't remember.
Q. Now isn't it a fact you don't remember that this boy (pointing) is the same boy you saw, in April?
A. The only reason I can tell is by his actions and his looks.
Q. His actions. What kind of actions?
A. Well, the way he walks.
Q. You haven't seen him walk here, have you?
A. Yes, in this courtroom.
Q. What was there special about his walk?
A. The way he, you know—I can't explain it.
Q. What is special about his looks?
A. The way he talks, you know, and his eyes.
Q. Now you saw that boy, you have indicated, for approximately a minute, in April, 1968, and you had never seen him before, had you?
A. No.
Q. You have never seen him since, until today, have you?
A. No, I haven't.
Q. Are you able to say this is the same boy you saw in April, after all that span of time?
A. No.
MR. ASH: The answer was no.
I have no further questions.

REDIRECT EXAMINATION

BY MR. WOLF:
Q. After the boy was picked up were you with him in the police car?

A. No, he was in the wagon.

Q. Did you see him at the police station?

A. Yes, I did.

Q. Did you have any doubt then that this was the boy—

MR. ASH: Objection.

Q. (Continuing)—who had taken the money?

A. See, it's hard, you know, to remember the boy; that was from April until now.

Q. That wasn't the question I asked you. I asked you whether at the time when you were in the police station with him, did you have any doubt then that this was the boy?

MR. ASH: Objection.

THE COURT: Objection overruled.

A. No, I didn't.

MR. WOLF: No further questions.

MR. ASH: Thank you.

MR. WOLF: The Commonwealth rests, Your Honor.

DEFENDANT'S EVIDENCE

BY MR. ASH: (to Defendant)

Q. Joseph, you have been sworn here to tell the truth, and you are to tell nothing but the truth to His Honor, the judge.

A. Yes.

Q. I want you to speak directly to him and in a manner so he can hear your every word.

Now, do you remember a time in April when you were arrested by the Park Guard in the park?

A. Yes.

Q. Can you describe the incidents leading up to that arrest?

In other words, where were you and who were you with?

A. Yes, sir. It was me, it was me and a boy named Mark Blunt, and another named Michael Williams. Me and Michael and Mark, we was driving up 33rd Street, and we seen the Park Guards around the playground, in the playground. So me and Mark and Mike, we rode around and we seen the Park Guards, and we seen some boy sitting in the car, and there were a lot of people around. So we went over there and we asked what happened, and they said the boys got robbed.

So me and Mikey and Mark, we rode off. So then the Park

Guard and these boys came over there to us. It was a wagon and a car and there was some Park Guards on horses. And then they stopped us, and then they told the boys to point us out, and the boys overlooked the other two but they pointed at me.

So the Park Guard searched me and he put me in the wagon, and then he took me down. Then he asked me questions and stuff. But they said I took a quarter off them, and then he found 40 cents.

Q. They found 40 cents on you?

A. Yes.

Q. Now you have indicated you were riding on 33rd Street?

A. Yes.

Q. Where were you coming from on 33rd Street?

A. I was coming from around my way.

Q. Around your house?

A. Yes. We were going to the park.

Q. Where do you live, by the way?

A. 2320 North Natrona Street.

Q. Was that the first time you entered the park that day or had you been there before?

A. That was the first time, you know, in the park.

Q. You have indicated when you entered the park you saw a group of people and you went over and you asked them what had happened, and then you learned there was a robbery: is that right?

A. Yes.

Q. Then you went on your own business, and then the police drove up, with these boys?

A. Yes.

Q. How much time elapsed between the time you made your inquiry and the time that the police came after you?

A. It was around, about six or five minutes.

MR. ASH: Cross examine.

CROSS EXAMINATION

BY MR. WOLF:

Q. How long have you worn glasses?

A. I wore glasses since I was small.

Q. Do you wear them all the time?

A. No.

MR. WOLF: I have no further questions.

THE COURT: Is that it?

MR. ASH: Your Honor, we are going to rest. I take the opportunity to make summation.

Your Honor sits as both trier of facts and determiner of law. Your Honor has heard the facts, and you now sit as the jury. I ask Your Honor to charge yourself, sitting as the jury, that the burden is on the Commonwealth to prove that this boy is guilty beyond a reasonable doubt, he comes here with the presumption of innocence. The boy has testified that he was with two companions, he entered the park, when he saw a crowd of people he went to those people and made inquiries. They said there was some sort of robbery. I submit if he was the guilty person involved in the robbery the last place he would have gone would have been where the people were collecting.

Then he stated he rode on, and five or six minutes later the police vehicle came by, with the boys, and he was with two other boys, and they said, "that's the boy."

Now the boys have indicated there were three boys involved in some way. It would seem to me that they indicated that all three boys were involved. If they thought the two boys with him were the guilty parties—I'm not questioning the good faith of the complainant here, and I think it is a terrible thing that happened to him—but the only issue here is whether this is the boy who committed that improper act. Because, I submit, Your Honor, as you sit as a jury, we have to be aware of human experience. An unknown person —I can only speak from my personal experience—if I meet a person for five minutes, that I had never seen before, I certainly couldn't stand in this court, from April until today, which I think is six months later, and say, "yes, I'm certain this is the same boy." We can't forget, as people, we can't forget, as judges and people, what we must remember as people. There were many boys in the park. I submit there is nothing special about this boy. I submit the boy that pointed him out did select a boy who he thought was similiar or was the same boy that had accosted him. I submit the boy that accosted him did not stay in that park.

I ask that this boy be given the presumption of innocence and that he be found to be not proven guilty of this offense.

THE COURT: Mr. Wolf?

MR. WOLF: I think it's essential that we do remember in the courtroom that we must bring with us our knowledge and our experience of the way human beings operate. I recall an occasion on which I was faced with a group of people, several years ago, who were threatening me. I remember them very vividly, they are engraved in my mind, I could pick them out in a crowd today.

This boy, James Raggio, who was the first witness, didn't just happen to spend five minutes with someone, he was threatened by him and he was hit by him. I think that our knowledge of human experience should indicate to us that this is the kind of situation where one is very likely to remember exactly what a person looks like.

In addition, after the initial identification, he had an opportunity to spend time with him.

THE COURT: Yes, one hour in the police station.

MR. WOLF: One hour. Which is why he remembers so clearly today that he's the boy who did it.

As far as the second witness is concerned, he is honest enough to admit he has no definite recollection.

THE COURT: He wasn't the kid who was hit.

MR. WOLF: That is right; which is an important distinction.

Also, he said at the time it happened he did remember and he was able to say this was the boy. And I think this is a very important circumstance in considering whom you believe, because that's the issue.

This boy does come with a presumption of innocence, but I think the situation here is that you have two witnesses who identify him as the one involved in this incident, and I would suggest that the case has been proven beyond a reasonable doubt.

MR. ASH: Your Honor, I want to make just one very brief comment in response to Mr. Wolf.

Your Honor, there is case after case of mis-identification, where somebody was absolutely certain, even bringing the thing to its most—well, I withdraw that. But we have even the famous case where in a totally dark room there was a pistol shot, and the person said that by the light of that pistol, "I'll never forget that face."

THE COURT: Don't bring in a dark room. This was at 1:30 or 2 o'clock in the afternoon.

MR. ASH: I was only bringing in that incident where the person said, "I absolutely know"—

THE COURT: The Court adjudicates him delinquent of larceny and robbery.

The case has been proven beyond a reasonable doubt. There are two firm identifications. Especially by the one who was hit in the face, he didn't flinch, he spoke straightforward, he remembered him, he pointed him out. He pointed him out to the police, and the identification was made within a 15 minute period from the time the incident happened untl the time he was picked up.

Where is the mother?

(Mother of defendant to the bar of the court.)

THE COURT: How many children do you have?

MRS. MC KEIVER: Nine. I have four boys. And could I say one thing, Your Honor?

THE COURT: Surely.

MRS. MC KEIVER: I don't really believe my son hit that boy, because this one is not a violent child.

THE COURT: You weren't there.

MRS. MC KEIVER: No.

THE COURT: It could happen. I'm glad it wasn't as serious—

MRS. MC KEIVER: And the robbery, I don't believe that, because that boy—

THE COURT: Well, that's the legal terminology, where it's taken by force or with fear, that's what we call robbery.

MRS. MC KEIVER: I know. But he has more money than I has. I borrowed money off him.

THE COURT: He has more money than you do?

MRS. MC KEIVER: Because he works. He's been working in the drug store, in the afternoon, I don't know for how long.

THE COURT: All the children live with you?

MRS. MC KEIVER: No. Me and my husband separated, and some live with my husband. I live two blocks away, but I be there twice a day. Six stay with him.

THE COURT: How old are your children?

MRS. MC KEIVER: I have one 28, 26, 19, 17, 15, 14, 13, 12 and 10.

THE COURT: What school do you attend?

THE DEFENDANT: I go to Daniel Boone.

MR. ASH: We are trying to get him transferred.

MRS. MC KEIVER: He's getting transferred.

MR. ASH: He is getting transferred.

MRS. MC KEIVER: He's supposed to go to Edison. They have two boys in the same grade, they have him mixed up in the graduation, and they sent him, for punishment.

THE COURT: Are any of your other children in trouble?

MRS. MC KEIVER: No.

THE COURT: Is there a family record?

Well, we have Kenneth McKeiver.

MRS. MC KEIVER: That's his brother.

THE COURT: William McKeiver.

MRS. MC KEIVER: He's the oldest one.

THE COURT: Who is Louise Ann White, your daughter?

MRS. MC KEIVER: My oldest daughter.

THE COURT: Well, we have three records here.

MRS. MC KEIVER: She don't live here, she's in New York.

THE COURT: Ma'am, all I can say is I have some information on your background, and it's not very pleasant, because it's not the kind of home that is conducive to raising good, healthy children. You have children by your husband, you have them by a paramour. You can't do things like that, in these kinds of times. And this might be a reflection, because this is the fourth child that is in court. So your batting average is not too good. It's close to 57 percent. You have had four in court out of nine.

Is he your youngest?

MRS. MC KEIVER: No, it's a girl, she is 10.

THE COURT: All right, we'll place him on probation.

All I can say is to watch him, and make sure he goes to school. There must have been a problem in school.

MRS. MC KEIVER: He goes to school. The teacher was being nasty with him.

THE COURT: The teacher was the mean one. All right. That is all.

IN THE COMMON PLEAS COURT OF
PHILADELPHIA

FAMILY DIVISION—JUVENILE BRANCH

---

(21)
IN THE MATTER OF EDWARD TERRY

No. J-162408

CONT'D FROM 2/27/69 (7-11-68, BURG., LARC., R.S.G.; & CONSP.)

---

(22)
IN THE MATTER OF EDWARD TERRY

No. J-162408

CONT'D FROM 2/27/69 (8-31-68, A & B ON OFF.; & CONSP.)

Philadelphia, Pa., March 27, 1969

ROOM "E", 1801 Vine Street

BEFORE:

HON. JOSEPH C. BRUNO, J.

PRESENT:

LOUIS POKRAS, ESQ.
A.D.A. for the Commonwealth
IRENE H. COTTON, ESQ. (C.L.S.)
for the Defendant

* * * * *

THE COURT: Do you want to say something?

MISS COTTON: I would like to explain to your Honor that we have two matters before you. One is for disposition only. That was for the burglary of the delicatessen which was heard by you. The other is the case in which we have refused to waive our right to a jury trial and all that you told me over the phone, what you intended to do, I don't think it is on the record, what the court wants to do about that.

THE COURT: At that time you made a request for a jury trial or, at least, you told me you made a request and one of the reasons I did not rule on it, at that time, was that the case was being—

MISS COTTON: Continued.

THE COURT: —continued for other reasons. The case is going to be tried today. I am denying your request for a jury trial.

MISS COTTON: Thank you, sir.

THE COURT: All right.

MR. POKRAS: We are ready to proceed on No. 22, your Honor, and that is an adjudicatory hearing. No. 21 is for disposition.

THE COURT: Yes, but unfortunately, on my list they have them both down for the same thing. So, just to make sure, which incident are you talking about?

My list does not—

MISS COTTON: Just assault and battery on a police officer.

THE COURT: What is the date of arrest?

MISS COTTON: August 31st.

THE COURT: August 31st on No. 22.

All right, Mr. Pokras.

COMMONWEALTH'S EVIDENCE

POLICE OFFICER SWEENEY (#456—Fairmount Park Police, Philadelphia, Pa.), sworn.

DIRECT EXAMINATION

BY MR. POKRAS:

Q. What is your name and number, officer?

A. Policeman Sweeney, No. 456, Fairmount Park Police.

Q. I call your attention to August 31st, 1968. Did you arrest Edward Terry on that day?

A. No, sir.

Q. Did you have an incident with him on that day?

A. Yes, sir.

Q. Would you tell the court the circumstances?

A. If your Honor please, on August 31st, 1968, at approximately 7:00 P.M., while assigned to the A.I.D. Division, West Park Police Division, patroling west on Parkside Avenue towards 53rd, I observed two young boys fighting on the sidewalk at approximately forty feet east of 53rd Street with approximately six boys, including the defendant, Terry, among them.

I stopped my prowl car and I called them to break the fight up, at which time the two young boys did.

I proceeded, again, west on Parkside Avenue and north on 53rd Street. At that time, I observed the six older boys encouraging two younger boys to fight again. I made a U-turn and I came back on the group. I got out of my prowl car and I went over to the two younger boys and I broke the fight up, and I told the boys, the older boys, that if they had nothing better to do to get out. I left and at that time, Terry who had a one by three, approximately three feet long, stick struck me on the left side.

BY THE COURT:

Q. Would you give me a description of that again?

A. A one by three wood stick, approximately three feet long, struck me on the left side with this stick and then ran east on Parkside, towards Edgewood and over Edgewood to Lindenwood.

I gave pursuit on Lindenwood Street and he stopped. I told him to drop the stick and he was under arrest.

He dropped the stick and then he swung at me with his right hand. I grabbed his hand and his arm. I got hold of him around the back of his neck or collar of his jacket and I told him to stop fighting, that he was under arrest.

He called for the other boys who were walking away from us to come back and help him which Roman Jones,

who had later been identified as Roman Jones, and four other boys came back and started to swing at me, and tried to get Terry away from me.

I called to one person standing in the store, for help, to call the police. The person made no move, so I pushed my way back into the prowl car and called for assistance, and gave chase at which time he was running south on 53rd Street, to Jefferson. I arrested, on August the 31st, Roman Jones.

Through information received from Roman Jones concerning Terry, who had the stick that he hit me with, and where I had given chase at the approximate address of 53rd Street, between Parkside and Jefferson, my partner and I, on 9/1/68, in an unmarked car, observed the defendant walking north on 53rd Street, at Parkside. He again spotted us and we gave chase, east on Parkside and south on Edgewood, and he went into an alleyway. We got out of the prowl car and gave chase, foot chase, at which time we caught him in front of his house and I arrested him. From there, with his mother, he was taken into the 19th District and slated.

Q. Officer, at the time of the incident of the fight, when he came after you, you say you grabbed his arm?

A. I grabbed his arm and the back of his collar.

Q. Did he ever complete his — —?

A. Yes, sir, later. When the other boys jumped me, I had no choice but to let him free.

Q. Were you struck?

A. Yes, sir.

Q. Was this by fist or otherwise?

A. By fist, like.

Q. What part of your body was struck?

A. Mostly on the left side. That's where I had him.

Q. Did you require any medical treatment?

A. No medical treatment.

MR. POKRAS: Cross examine.

CROSS EXAMINATION

BY MISS COTTON:

Q. Officer Sweeney, when you told the boy to put the stick down, you testified that he did so?

A. The boy?

Q. The boy who had the stick, did he put it down?

A. (No response.)

Q. After he put the stick down, what did you do?

A. I told him to put the stick down and he was under arrest.

Q. This was after he put the stick down, what did you do?

A. I started to walk towards him and when I stepped forward he swung at me. That's when I grabbed him.

Q. You said that he swung at you? Did he connect?

A. No. I caught one with my hand. That was the only thing that helped at the time.

Q. How did you grab him?

A. By the arm and probably around the back of the neck. I tried to get the jacket. It was a shirt, I believe. He had a shirt on. I tried to get the shirt and pull him off balance.

Q. And did you manage to get him into the car?

A. No.

Q. What happened?

A. He called the other boys to help him at which time four other boys came swinging at me and dragging Terry away from me.

Q. And how did you react to that?

A. I called for help to assist me. As I said, there was an adult standing in the store doorway, which was approximately fifty feet south of Lindenwood Park Terrace and I called—he was standing in the doorway. I called him to call the police that I needed help. So, he made no move. I pushed and shoved to my prowl car and then they all took off at that time.

Q. Did you have your service revolver, blackjack, nightstick and things of that nature?

A. I had a service revolver and my blackjack—I mean my jack was in the car.

Q. Did you make any attempt to use these weapons?

A. When they took off, I had the mike in my hand. That was the only thing I could get free to call—

Q. Now, the following day, you went to arrest the boy and you finally caught up with him at his house?

A. Right. He tried to go into his house but the door was locked.

Q. When you tried to apprehend the boy, did he go quietly?

A. No, ma'am.

Q. What happened?

A. He started to fight as soon as I grabbed him. I mean I physically grabbed him in the back and at that moment he struggled and turned, and he definitely knew what was being done to him. He started to fight and was threatening and was calling for his mother, and the detective and myself, we took him in.

Q. How did you manage to take him in?

A. (No response.)

Q. He is a big fellow, what did you have to do to get him in?

A. Nothing, once we managed—well, one of us was holding his hands and once we mentioned his mother was coming with us, he just came and, like, he waited until his mother came.

Q. Before his mother came, what did you have to do?

A. Hold him from hitting me. Other than that, nothing.

Q. Nothing other than that?

A. (No response.)

MISS COTTON: No further questions.

MR. POKRAS: The commonwealth rests.

MISS COTTON: At this point, we will demur to the charge of disorderly conduct, in which there has been no evidence.

By the officer's own testimony, this was a scrape in which there were six fellows, including Terry, who were urging younger boys to fight but that does not constitute disorderly conduct.

THE COURT: How about the reference to the testimony, Miss Cotton, about when the officer went back again and he found these boys urging the others to fight?

MISS COTTON: That's what I am talking about, sir.

THE COURT: And when this fellow swung a stick at the officer, when he took part in an affray, after the officer placed him under arrest and he called for help from the others and he took a couple more swings at the officer—I deny the demurrer.

MISS COTTON: All right, sir.

We call Mr. Goobey.

DEFENDANT'S TESTIMONY

ROBERT GOOBEY (1737 North Lindenwood Street, Philadelphia, Pa.), sworn.

DIRECT EXAMINATION

BY MISS COTTON:

Q. Would you spell your last name?

A. G-o-o-b-y.

BY THE COURT:

Q. Mr. Gooby, would you try to keep your voice up?

THE CRIER: Speak up!

BY THE COURT:

Q. So that I can hear everything.

A. Right.

Q. I want to hear what you have to say.

A. (No response.)

BY MISS COTTON:

Q. Mr. Gooby, I will stand here and I will talk to you and you will address your answers to the judge so that he can hear you.

A. (No response.)

Q. Were you present at the time the officer came upon Terry and the other boys with this stick; is that correct?

A. I was present at the time when the officer came around the corner. I was going across the street towards my house.

Q. And what did you see while you were there in the street?

A. Well, in a short space of time, I saw these two boys as I was coming out of the store standing in the street with a board in their hand and just about this time the officer's car came around the corner. So, he said, "What are you fellows doing. Come here."

And they stood there, and he said, "Get into the car."

So the boys said, "What for?"

And he said, "I said, get into the car."

In the meantime, he appeared to be putting on his gloves.

Q. Pardon me. He called them "fellows"?

A. Well, he said, "You boys come here," and they moved somewhat hesitantly. So, it appeared as though he was going to force them in and this is when he reached out and grabbed this particular fellow in the collar as to put him into the car and this is when, you know, the fisticuffs started.

Q. Mr. Goobey, did you testify that the officer put on a pair—

MR. POKRAS: I will object. She is leading: "Did you testify that—"

MISS COTTON: Well, I will have the stenographer read it back.

(The previous question and answer was read back as follows:)

"Q. And what did you see while you were there in the street?

"A. Well, in a short space of time, I saw these two boys as I was coming out of of the store standing in the street with a board in their hand and just about this time the officer's car came around the corner. So, he said, 'What are you fellows doing. Come here.'

"And they stood there, and he said, 'Get into the car.'

"So the boys said, 'What for?'

"And he said, 'I said, get into the car.'

"In the meantime, he appeared to be putting on his gloves."

BY MISS COTTON:

Q. When the boys did not move fast enough towards the officer's car, what did Officer Sweeney do then?

A. Well, when he made the statement, one of the boys—one of the smaller ones, he walked away. The other one remained standing and this is when the officer reached out and grabbed him by the neck, and this particular action caused this fellow to naturally try to free himself, and this is when it started, you know, the blows and wrestling around.

Q. Did it appear to you, from what you could see—

THE COURT: I don't want to know how it appeared to him. I want to know what he saw.

BY MISS COTTON:

Q. Did you see the officer—

THE COURT: Watch the question, now. You'd better not be leading.

MISS COTTON: He has already testified, sir, that he saw the officer put his arm around the boy's neck.

THE COURT: All right.

MISS COTTON: Now, I want to know what that arm around his neck did, if anything.

A. Well, No. 1, he reached out and grabbed the fellow, first of all, with his—he reached around and grabbed him by the neck. I don't recall which hand but, anyway, the fellow pushed away and this made him reach around his head, I think, in this manner (indicating), and he grabbed him behind the head as if he was pulling towards him or—towards him and they started to wrestle around again, and by that time, it was in the middle of the street. Then the officer reached around and he first grabbed his pistol, and then he looked directly at me and then he went around me and he got his blackjack. Then they again started wrestling around and all this took place in just a few seconds, really.

Q. Mr. Gooby, did you know this boy on the day of this incident?

A. Not really. I only know that I have seen him in the neighborhood.

Q. Did you know any of his family before?

A. Not intimately. I have seen them both in the neighborhood. I mean we had no close affiliations.

Q. Is that how you became acquainted?

MR. POKRAS: Objection to the term, your Honor.

THE COURT: Objection overruled.

BY MISS COTTON:

Q. What did you do about the incident that you saw?

A. Well, for one thing, my being present there I was asked, I think, the next day, if I'm not mistaken, it was on a Sunday, if I would go down—

MR. POKRAS: I object.

THE COURT: Objection sustained.

A. (continuing)—go to the—

THE COURT: The objection was sustained.

BY MISS COTTON:

Q. Don't answer that question, Mr. Gooby.

Did you go to the police station to report this incident?

MR. POKRAS: I will object.

THE COURT: Miss Cotton!

MISS COTTON: If your Honor please—

THE COURT: I want to give you as much leeway as I can reasonably give you. You will notice I didn't say legally, because I have given you more than that but I have to stay within reason.

MISS COTTON: I think that objection was on account of hearsay from Mrs. Terry, but now I am not asking—

THE COURT: You are asking a leading question.

MISS COTTON: Very well, your Honor.

BY MISS COTTON:

Q. Did you discuss this incident with anyone?

MR. POKRAS: I will object.

THE COURT: Objection sustained.

MISS COTTON: Well, now that your Honor knows what I am trying to reach, then every question I will ask will appear to be leading.

THE COURT: Well, now, you know the rules of evidence as well as I do, Miss Cotton. I can't throw out the rules of evidence just because you can't find a way around them.

May I see both of you at side bar?

MISS COTTON: Yes, sir.

(Side bar conference.)

MISS COTTON: If your Honor please, we will hear from Mrs. Terry.

THE COURT: All right.

MRS. TERRY (Mother of Juvenile), sworn.

DIRECT EXAMINATION

BY MISS COTTON:

Q. Mrs. Terry, on the day that Eddie got arrested—it was Sunday, you were at home; is that correct?

A. Yes, sir.

Q. And I want you to speak loud so the judge can hear you.

Would you tell him what you heard and saw on that day?

A. Well, it was Sunday. I was in the house and I heard a commotion out front and I thought, perhaps, it might have been the kids because it was, like, coming from my picture window. I have a large window, and I got up and I ran to the door there. And when I got to the door, I saw Officer Sweeney with my son, with this hand—

MISS COTTON: Indicating the left hand.

A. (continuing) And at this time they were fighting. He had already passed one, just as I was going to the door. He hit him again and this is when I ran between them and I asked him what he was doing, what was this all about.

I said to him, "Why can't we go into the house and perhaps you can explain this to me?"

And he told me, he said, "No, I'm not going anywhere."

Terry was crying. He said, "Let my mother go with me."

I asked him would he wait until I could go too—

BY THE COURT:

Q. Did he wait?

A. Yes, sir.

MISS COTTON: Cross examine.

MR. POKRAS: No questions.

MISS COTTON: Thank you, Mrs. Terry, you may sit down.

(Witness excused.)

MISS COTTON: This is the case for the defense, Your Honor.

Now, if your Honor please, I think what the evidence has indicated, that Officer Sweeney came across a group of scuffling youngsters and he told them to break it up and they did.

He came across a boy with a piece of wood and he told him to put it down. The boy with the stick, Edward Terry, did put it down there.

THE COURT: Just a minute, Miss Cotton. Let's get the summary of what happened correctly. The officer came upon two young boys fighting, being egged on by a group of older boys.

MISS COTTON: It was first, only being watched by a group of older boys.

THE COURT: He said, "Break up that fight."

MISS COTTON: Yes, sir, peaceably.

THE COURT: He saw the boys were urging the younger boys to fight again. He made a U-turn and he went back. The defendant had a stick which, before, he had put it down and he struck the officer with the stick. That is the testimony.

Then the officer said, "Put down the stick, you are under arrest."

He put the stick down. The officer walked toward him. He swung at the officer.

Now, that is the testimony up to this point.

MISS COTTON: All right. Before this boy swung at the officer?

THE COURT: Yes.

MISS COTTON: After the officer told him he was under arrest?

THE COURT: Yes.

MISS COTTON: The officer put on a pair of black gloves. Now, I don't know why he did that but it would indicate that this officer was spoiling for a fight, that he knew he was going to strike this child and—

THE COURT: Miss Cotton, if you want to recite what the testimony was, that—

MISS COTTON: No, sir. I am not doing that.

THE COURT: But I am not going to let you use that type of language in this courtroom in the light of the testimony that has been presented here today. There is no indication that this officer or any one else was spoiling for a fight other than this defendant.

MISS COTTON: Your Honor, it was not the defendant who put on a pair of gloves before touching another person, and I am sorry if the word "spoiling," offended the court. I didn't mean to use that type of language here.

THE COURT: The testimony is that one witness saw the officer putting on a pair of gloves, or apparently putting on the part of a glove period. That is the only testimony you have as to any mention of gloves. This same witness did not see what had occurred before.

Now, if you are looking for an explanation as to why the officer put that glove on, I can think of one—as protection against the stick that was being swung at him.

All right, go ahead.

MISS COTTON: If Your Honor please, the testimony was, the stick was swung at him at 53rd and Parkside. The gun incident took place at 51st and Lindenwood, which was sometime later the same day. At that point the boy had the stick and he put it down when he was told to.

THE COURT: All right, go ahead, Miss Cotton. I know what the testimony was.

Go ahead.

MISS COTTON: The next day when Officer Sweeney came to the residence of the defendant, he testified he had to chase the boy and when he caught him he had to hold onto him.

THE COURT: He said with the help of a fellow officer.

MISS COTTON: Who arrived later.

THE COURT: Who arrived later and that they were holding him, together.

Okay, go ahead.

MISS COTTON: Mrs. Terry testified she heard a commotion on the porch and what she saw was Officer Sweeney holding her boy with his left hand and striking her boy with his right.

Now, there is a variance of testimony and it is up to you to resolve that.

THE COURT: All right.

MR. POKRAS: The only thing that I can add was that the mother didn't see what happened when the officer and the boy first came together.

THE COURT: Look, I understand the mother's testimony and I believe every word the mother said.

MR. POKRAS: That's right.

That's all I have.

THE COURT: There is no question in my mind as to the mother's testimony.

I adjudge Edward Terry delinquent.

May I ask you first, Miss Cotton, maybe you can save me sometime of going through this record—

MISS COTTON: Yes, sir, I can.

THE COURT: Has the defendant been committed anywhere?

MISS COTTON: Yes, sir.

In January, he was charged with an assault on a teacher and his case came up last week before Judge O'Neill. He was adjudged delinquent and he was committed to Cornwell Heights.

THE COURT: Where?

MISS COTTON: Cornwell Heights.

THE COURT: All right. I will make the same disposition.

MISS COTTON: Very good, sir.

THE COURT: Cornwell Heights in both 21 and 22.

That was 21's testimony that I had deferred disposition on?

MISS COTTON: Right.

BY THE COURT: (to Deft.)

Q. Young man, let me just say this to you: We have too much violence on our streets, and I want you to do something as you grow up. I want you to start learning how to respect an officer when he tries to break up a fight. You are going to turn this city into a real holocaust. You are going to have to live in it, son. Make it a better place in which to live.

You are a healthy, good looking boy and there is no reason in the world why this should not be a good place to live in so that you can enjoy it and raise a family of your own. But this kind of activity on your part is inexcusable. All you are doing is to help drive this city further down.

A. (No response.)

THE COURT: Now, Cornwell Heights, you have already been committed there. I am going to make the same commitment.

I think that maybe you can get some guidance there that may help you change some of your thinking.

All right.

MISS COTTON: Thank you, sir.

[109]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 289 January Term, 1970

IN THE MATTER OF EDWARD TERRY,
A Minor

Appeal of Edward Terry, A Minor

No. 290 January Term, 1970

IN THE MATTER OF JOSEPH McKEIVER,
A Minor

Consolidated Appeals from the Orders of the Superior Court of Pennsylvania at October Term, 1969, Nos. 717 and 666, Affirming the Orders of the Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, C.C. No. 140439, J. No. 162408 and C.C. No. 102024, J. No. 131550.

Appeal of Joseph McKeiver, A Minor

OPINION OF THE COURT

ROBERTS, J.

Filed: May 4, 1970

Joseph McKeiver[1] and Edward Terry[2] are juvenile delinquents, having acquired that status upon findings by

---

[1] In May of 1968 appellant Joseph McKeiver, then sixteen years old, was charged with robbery, larceny and receiving stolen goods in a juvenile delinquency petition. The essence of the charge was that he and

the Juvenile Court of Philadelphia that each had violated a law of the Commonwealth.[3] The Superior Court affirmed

---

some twenty or thirty other youths had taken some twenty-five cents from three young teenagers. At the time the charges were brought against him, appellent had never before been arrested and had a record of gainful employment.

When McKeiver's case was called for trial on October 17, 1968, his counsel advised the court that he had not had an opportunity to discuss the case with his client and was therefore unable to proceed. The court gave counsel five minutes to talk with his client and then proceeded to hear the case. Counsel requested and was denied the right to a jury trial.

The Commonwealth's evidence consisted of the testimony of two of the three alleged victims, who gave the following narrative of events. While they and a companion were playing in Fairmount Park, they suddenly realized that they were being pursued by some twenty or thirty boys on foot and by three boys on bicycles. Two of the boys who were on bicycles remained at a distance while the third approached the three victims. What the small army of robbers on foot did at this point is unclear, but the remaining boy on a bicycle demanded money. One of the three victims refused, was punched and gave the thief a quarter. The bandit then rode off and the three victims were taken to a park guard station by a passing motorist where, after a few minutes of preliminary questioning, the two witnesses were placed in a patrol car and taken for a ride around the area. Within minutes the two victims spotted someone whom they thought was the boy who robbed them—that person turned out to be Joseph McKeiver.

The testimony given by the two alleged victims at the hearing was weak. One described the robbery as a gang effort while the other testified that the thief acted alone. Both stated that the robber did not have on glasses, but McKeiver has worn them since childhood. One testified that the robber gave his bicycle to another *and* that the robber rode a bicycle away from the robbery, and was riding one when arrested. Both said that the robber rode a bicycle throughout the event, and yet one stated that he identified the robber by his distinctive walk.

After the evidence was given, counsel for McKeiver made an argument to the trial judge similar to that usually made to a jury: the story of the alleged victims was incredible, the eyewitness identification of children is unreliable, and the facts had not been proved beyond a reasonable doubt. The judge was apparently unimpressed by these efforts; he found McKeiver to be a "delinquent child" and placed him on probation. McKeiver applied for a rehearing alleging that the court had erred in refusing him the right to a trial by jury. The petition was denied and the Superior Court affirmed *per curiam*, without opinion.

[3] Edward Terry was adjudged a juvenile delinquent on March 27, 1969, in proceedings initiated by petition. The evidence tended to show that one Officer Sweeney, of the Park Guard, happened upon a fight in the park and that when he ordered the combatants to break up, two of the observers to the fight hit him with fists and with a stick. Sweeney was apparently not injured. Later that same day Sweeney saw the two boys

the adjudications per curiam and we granted allocatur. Their consolidated appeal raises a single question: whether there is a constitional right to a jury trial in juvenile court.

Appellants argue that the Constitution of the United States, especially as interpreted by *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967) and *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), gives them the right to insist on a jury trial. We cannot agree.

For over sixty-five years the Supreme Court gave no consideration at all to the constitutional problems involved in the juvenile court area.[4] Then came the landmark decision in *In re Gault*.[5] The decision is somewhat of a paradox, being both broad and narrow at the same time. It is broad in that it evidences a fundamental and far-reaching disillusionment with the anticipated benefits of the juvenile court system:

"[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in

---

who had attacked him. Sweeney ordered them to halt, which they did. Apparently Sweeney then grabbed Terry about the neck, but he escaped and ran away. The next day Sweeney again saw Terry on the street and, after a chase, caught and arrested him. Terry testified that Sweeney beat him at the time of the arrest.

Terry's case was first called on January 20, 1969. At that time counsel for Terry indicated that he wished to have a jury trial and the matter was continued. The hearng was finally held on March 27, 1969, at which time counsel for Terry reiterated his request for a jury trial, which was denied. Terry was found to be a delinquent and was committed to the Youth Development Center at Cornwells Heights.

[3] "(4) The words 'delinquent child' include:

"(a) A child who has violated any law of the Commonwealth or ordinance of any city, borough or township; . . ."

Act of June 2, 1933, P.L. 1433, 11 P.S. § 243.

[4] "The original juvenile court act of Illinois, a model quickly followed in almost every state, was approved by the governor of Illinois on April 21, 1899. Until March 21, 1966, the Supreme Court had never passed upon the legality of the juvenile court procedures or of police practices respecting juveniles." Paulsen, *Kent* v. *United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167 (1966).

[5] *Gault* was presaged by *Kent* v. *United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966), although the narrow issue involved in *Kent* concerned the nature of the requirements for a valid waiver of the Juvenile Court of the District of Columbia's "exclusive jurisdiciton."

any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, as we remarked in the *Kent* case, supra, the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absense of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." [6]

Continuing to paint with a broad brush, the Court announced its intention to require that the juvenile courts function with "the procedural regularity and the exercise of care implied in the phrase 'due process.'" [7] At this point, however, the Court narrowed the focus of its decision and quoted from its earlier holding in *Kent*, saying:

> " 'We do not mean * * * to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' We reiterate this view, here in conjunction with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." [8]

---

[6] *In re Gault*, 387 U.S. 1, 17–19, 87 S.Ct. 1428, 1438–39 (1967).

[7] 387 U.S. at 27–28, 87 S.Ct. at 1444.

"Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data." 387 U.S. at 20–21, 87 S.Ct. at 1439–40.

[8] 387 U.S. at 30–31, 87 S.Ct. at 1445, citations omitted.

The Court then specifically enumerated four due process rights which it held applicable in juvenile proceedings: (1) the right to adequate and timely notice of the charges; (2) the right to counsel; (3) the right to confrontation and cross-examination; and (4) the privileges against self-incrimination. Additionally, a majority of the Court specifically declined to rule on two other rights; the right to a transcript and the right to appellate review.

As can be seen from the quoted language, we are confronted with a sweeping rationale and a carefully tailored holding. If we had only the broader language it would be difficult to resist the conclusion that the Supreme Court had concluded that juvenile courts must comply with *all* the requirements of due process. The holdings do not, however, seem to contemplate so large a result, and our task is to decide whether the right to a jury trial ought to be operative in the juvenile court under the reasoning of *Kent* and *Gault* or under our own reading of the Constitution.

Appellants argue that the Supreme Court's 1968 decision in *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), is useful in the quest for a determination of what ought to be included in the bundle of due process rights properly applicable in juvenile courts. The Supreme Court there held that the "Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." [9] Again, the Court spoke in sweeping language, calling the right to trial by jury fundamental to our system of justice, and installed the right to a jury trial as one of those protections in the Bill of Rights which is fully applicable as a restraint on state conduct.

But *Duncan* also contained language which indicates that the ruling is not necessarily controlling here. In a discussion of the proper standards for "incorporation," the Court indicated that a new standard had been operating in recent cases. No longer was the inquiry to focus on whether *some* civilized system of justice could be constructed without utilization of a particular safeguard. Realizing that every state in the union operated under highly similar versions of the Anglo-American common law system, the Court declared

[9] 391 U.S. at 149, 88 S.Ct. at 1447.

that incorporation was appropriate whenever a particular procedure was fundamental to this kind of a legal system—"whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."[10] The Court then enumerated those protections in the Bill of Rights which had recently been made applicable to the states, add concluded that of each "it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American states."[11] Referring specifically to the right to trial by jury, the Court stated that a "criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which serve the purpose that the jury serves in the English and American system."[12]

In addition to the above stated restriction on the absolutism of *Duncan*, we must also consider the narrower portions of *Gault's* holdings, remembering that the Supreme Court specifically refused to apply the totality of the due process procedural safeguards to juvenile courts. Keeping these restrictions in mind, we can now determine whether the right to a trial by jury is "fundamental" in the context of our juvenile courts, within the meaning of *Duncan*.

In seeking to answer this question, we must recognize that the due process procedural safeguards which *Gault* specifically made applicable to juvenile courts have already caused a significant "constitutional domestication" of juvenile court proceedings. The right to adequate and timely notice, the right to counsel, the right of confrontation and cross-examination, and the privilege against self-incrimination serve to eliminate much of the danger of arbitrariness. Further, we are confident that juveniles also enjoy the right to have a transcript of the hearing, the right of appellate review,[13] and the right to be declared delinquent only upon evidence which demonstrates that the facts upon which the

---

[10] 391 U.S. at 150, 88 S.Ct. at 1448 (footnote 14).

[11] Id.

[12] Id.

[13] Act of June 2, 1933, P.L. 1433, 11 P.S. § 257.

declaration is made are true beyond a reasonable doubt.[13a] Together these rights insure that the juvenile court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation and the impartiality of the tribunal [14] and at the same time informal enough to permit the benefits of the juvenile system to operate.

The proper inquiry, then, is whether the right to a trial by jury is "fundamental" within the meaning of *Duncan*, in the context of a juvenile court which operates with *all* of the above constitutional safeguards. Since the Supreme Court felt that the right was "fundamental" in the context of the normal criminal process, which also operates with all of these safeguards, it is our view that the answer to our inquiry turns upon whether there are elements in the juvenile process which render the right to a trial by jury less essential to the protection of an accused's rights in the juvenile system than in the normal criminal process, and

---

[13a] ". . . The constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privileges against self-incrimination." *In re Winship*, No. 778, October Term, 1969 (Supreme Court of the United States, filed March 31, 1970).

[14] "[R]ecent studies . . . suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude as far as the juvenile is concerned." 387 U.S. at 26, 87 S.Ct. at 1443.

"[T]here is another observation worth making. Informal methods relying on kindness, expertise, and discretion are most acceptable in contexts of trust. If nearly everyone in a community shares a common faith in institutions, and in the generally prevailing goals, safeguards designed to protect against abuse will not seem so important. . . . [But] this is not the situation in the crisis-ridden cities of today. . . . Divisions in the urban community are deep. Formal procedure, to some extent may be able to dispel mistrust. A judge who is supplied with specific rules regarding the fundamentals of fairness and who follows them may lessen the tensions that both he and the respondents feel. The adversary system that many see as a machine to sow discord does give the dispossessed a voice, and a time and place to be heard, and may offer a sense of participation in the decision making that may affect respondents mightily. Ironically, the adversary system may provide some badly needed glue for the preservation of unity." Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 Supreme Court Review 233, 242–43 (1967).

therefore not so "fundamental" as to be constitutionally required.

We believe that such factors do inhere in the juvenile system. First, we believe that the judges in the juvenile courts do take a different view of their role than that taken by their counterparts in the criminal courts.[15] We fully realize that this faith in the quality of the juvenile bench is not an entirely satisfactory substitute for due process, and we certainly do not rely heavily on this essentially subjective factor; but on the other hand we do not choose to ignore such considerations, and will not deprive them of all weight.

Second, the juvenile system has available and utilizes much more fully various diagnostic and rehabilitative services. And although the experts are not nearly so numerous as one might hope, they still provide the juvenile courts with services specially designed to aid minors, which are far superior than those available in the regular criminal process. It is the opportunities for progress offered by this area which constitute the single best reason for preserving the juvenile system. Properly operated, the juvenile system is capable of giving understanding and sympathetic treatment for each juvenile by providing the correctional, rehabilitative and instructional attention appropriate to each case. Having recognized the value of this approach, it is indeed regrettable that it is as inadequately utilized as it is. In this area more than in any other, it is the false economies of today which will contribute exponentially to the waste of tomorrow. Yet a little bit of wisdom is better than none, and in the end we see this aspect of the juvenile system; underused though it may be, as constituting one of its very real strengths.

Third, we must recognize that the end result of a declaration of delinquency *is* significantly different from and less onerous than a finding of criminal guilt. There is no public record of the adjudication,[16] and its results are not admis-

---

[15] See generally *Commonwealth* v. *Johnson*, 211 Pa. Superior Ct. 62, 234 A.2d 9 (1967).

[16] "The records of the proceedings of the juvenile courts shall be kept in a docket separate from all other proceedings of such courts, and shall be withheld from indiscriminate public inspection, but shall be open to inspection by the parent or other representative of the person, institutions, association or society concerned, and other persons having a legitimate interest." Act of June 2, 1933, P.L. 1433, 11 P.S. § 245.

sable in subsequent legal proceedings. None of the disabilities which follow a criminal conviction attach to an adjudicated delinquent,[17] and most importantly, the institutions to which juveniles are committed are something less than jails, for there is a greater emphasis on rehabilitation. We do not mean to say that the post-adjudication process has lived up to expectations. It has in many respects fallen far short of its goals, and its reality is far harsher than its theory. But we are not yet convinced that the current practices do not contain the seeds from which a truly appropriate system can be brought forth.

Finally, we note that of all the possible due process rights which could be applied in the juvenile courts, the right to trial by jury is the one which would most likely be disruptive of the unique nature of the juvenile process. Utilization of the other due process rights in the juvenile courts will not require the judge to abandon traditional practices; the hearing can still be conducted with some flexibility and with patience and understanding. A jury trial, on the other hand, by replacing the judge as the finder of fact, would probably require substantial alteration of the traditional practices. Faced with the necessity of refereeing a contest between the state and one of its juvenile citizens, and deprived of the power of the final arbiter, the juvenile court judge would of necessity have to concern himself much more with the technicalities of proper procedure, and would have a vastly reduced capacity to guide and mold the hearings. It is our view that the procedural rights which we have held applicable in the juvenile process will give the juveniles sufficient protection, and there is no need to add an element, the right to a trial by jury, which might well destroy the traditional character of juvenile proceedings.

As must be obvious by this time, we are confident that a properly structured and fairly administered juvenile court system can serve our present societal needs without infringing on individual freedoms.[18] It is this confidence which, as

---

[17] Act of June 2, 1933, P.L. 1433, 11 P.S. § 261.

[18] This Court, under the power granted it by Article V, Section 10(c) of the Pennsylvania Constitution, has the authority to formulate rules governing the practice, procedure and conduct of the juvenile courts in this Commonwealth. This authority can and will be utilized whenever circumstances indicate that action is necessary to maintain the con-

much as anything else, has led us to the conclusion we reach today. Until such a time as we are disabused of our belief that the potential for growth inherent in the juvenile system will not be ignored, we hold that the juvenile courts in this Commonwealth, if conducted in accordance with the procedural safeguards set forth in this opinion, are not constitutionally compelled to grant their constituency the right to a trial by jury.

Orders affirmed.

Mr. Justice Cohen filed a Dissenting Opinion.

---

stitutionality and fairness of juvenile proceedings, and we note that a committee is currently formulating, for submission to this Court, a set of comprehensive rules covering juvenile proceedings.

[109]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 289 January Term, 1970

IN THE MATTER OF EDWARD TERRY,

a Minor

Appeal of Edward Terry, a Minor

No. 290 January Term, 1970

IN THE MATTER OF JOSEPH McKEIVER,

a Minor

Consolidated Appeals from Orders of Superior Court, Nos. 717 and 666, October Term, 1969, Affirming Orders of Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, C.C. No. 140439, J. No. 162408 and C. C. No. 102024, J. No. 131550

Appeal of Joseph McKeiver, a Minor

DISSENTING OPINION

COHEN, J.

Filed: May 4, 1970

The Sixth Amendment to the United States Constitution states "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." In *Duncan* v. *Louisiana*, 391 U.S. 145, 154

(1968), the United States Supreme Court held that "the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." The majority recognizes these principles but finds that four factors inhere in the juvenile system which "render the right to a trial by jury less essential to the protection of an accused's rights . . . than in the normal criminal process, and therefore not so 'fundamental' as to be constitutionally required." These elements are (1) the different view of their role taken by judges in the juvenile courts as opposed to their counterparts in the criminal courts, (2) the availability to and the utilization by the juvenile system of various diagnostic and rehabilitative services, (3) the different end result of a declaration of deliquency compared with a finding of criminal guilt, and (4) the disruption of the unique nature of the juvenile process that would result from the introduction of jury trials.

The majority apparently believes that the existence of these factors means that the due process of law is not denied juveniles when they are denied a jury trial and thus that the juvenile court system is an exception to the general rule enunciated in *Duncan*. First, I cannot agree with the majority that footnote 14 in *Duncan* or anything else in the opinion represents a restriction on the absolutism of its holding. In that footnote, 391 U.S. at 149-50, the Court stated that incorporation was proper whenever "given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." The Court then stated that it could easily imagine a fair and equitable criminal system that used no juries and remarked that such a system "would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems." That statement in no sense narrows the holding in *Duncan*; if anything, it amplifies it by emphasizing the role the jury plays in the Anglo-American system of jurisprudence. *Duncan* clearly stands for the proposition that the due process of law requires that the states provide jury trials in all serious criminal cases.

Having determined that nothing in the *Duncan* opinion itself detracts from the absolutism of its holding, it is

necessary to examine the four elements the majority believes distinguish the juvenile system from the criminal court system to see if they are legally and/or constitutionally relevant. The majority itself states that it does not rely heavily on the first factor (the view of their role taken by juvenile court judges), and the United States Supreme Court, in the recent case of *In the Matter of Samuel Winship*, U.S. (1970) (holding that the constitutional standard of proof beyond a reasonable doubt is required during the adjudicatory stage of a delinquency proceeding), stated, U.S. at, "[w]e made clear in that decision [Gault] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts. . . ."

As to the availability to and utilization by the juvenile system of various diagnostic and rehabilitative services (factor 2), this seems relevant to the post-adjudicative or dispositional process rather than to the adjudicative stage. Certainly the process by which one is adjudged a delinquent has little to do with the understanding and sympathetic treatment the juvenile system is capable of giving through correctional, rehabilitative and instructional attention. What is done with an individual after it is determined he is a delinquent is a very different problem from that concerning the process by which it is decided that he is a delinquent.

The majority's third element is the different end result of a declaration of delinquency compared to a finding of criminal guilt. This includes no public record of the adjudication, the inadmissibility of the results in subsequent legal proceedings, the non-imposition of the disabilities which follow a criminal conviction, and the fact that institutions for juveniles are "something less than jails." In *Winship*, however, the United States Supreme Court stated, U.S. at ,

> "We do not find convincing the contrary arguments of the New York Court of Appeals. *Gault* rendered untenable much of the reasoning relied upon by that court to sustain the constitutionality of § 744(b). The Court of Appeals indicated that delinquency adjudication 'is not a "conviction" (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confi-

dentiality is thrown around all the proceedings (§§ 783-784).'"

In light of this, I feel that the third element is constitutionally irrelevant.

The final element is the disruption of the unique nature of the juvenile process which would allegedly occur with the introduction of trial by jury. There seems little doubt that the introduction of jury trials would necessitate the judge's concerning himself with the technicalities of proper procedure to a greater extent than required now and would reduce somewhat the flexibility and informality of the hearing. It would seem, however, that the beneficial aspects of the juvenile system result not from the adjudicatory stage but rather from the pre- and post-adjudicative stages in which, hopefully, some rehabilitation can be accomplished. It is difficult to see how the informality or flexibility of the hearing can have much effect on molding the juvenile's outlook so that his conduct will be in conformity with the rules society has established. Informality and flexibility are not ends in themselves: the purpose of the adjudicatory stage is to determine whether the defendant is a delinquent, and as some loss of informality and flexibility will not have a great effect on whatever rehabilitation the juvenile system can accomplish, I do not see an alteration of the "traditional character of juvenile proceedings" as so weighty a factor as to render the right to a jury trial less fundamental in the juvenile system than in the ordinary criminal process.

Therefore, I do not feel that the elements on which the majority relies are of such relevance and validity as to distinguish the juvenile system from the criminal court system and thus make the broad holding of *Duncan* inapplicable.

Courts today appear to be of two minds with respect to the rights of juveniles. The United States Supreme Court decisions in *Gault* and *Winship* make clear that the essentials of due process and fair treatment must be applied to the adjudicatory stage of delinquency proceedings, but in *Winship* the Court was careful to point out that its holding would not destroy the beneficial aspects of the juvenile process. Thus, due process and parens patriae have come into direct conflict. Such conflict can be seen in the decisions of this Court. For example, the majority opinion in *In the Matter of Charles Wilson,* Pa. , A. 2d

(1970) emphasizes constitutional requirements while the tone of the majority opinion in this action reflects the feeling that juveniles and the juvenile court system are somehow different and special and that the beneficial aspects of the juvenile process will be destroyed by the application of too many of the rights given adults. The trend of the United States Supreme Court decisions, however, appears to be away from parens patriae in the adjudicatory stage, and the right to trial by jury is an essential part of the adjudicatory process. I do not see valid reasons why *Duncan* should not apply to the juvenile court system.

Finally, as the United States Supreme Court has granted certiorari in *In re Burrus,* U.S. Law Week (April, 1970), in which it will face the issue presently before us, we should not have filed the opinions in this action until the *Burrus* opinion is filed. We, of course, will be bound by its decision, and, as we have waited this long for this difficult issue to be resolved, we should wait until the matter is finally settled. Once the *Burrus* opinion is filed, our opinion in this action will be of no consequence, and it is a futile effort for us to deal with this issue at this time.

I dissent.

Supreme Court of the United States

No. 2300 Misc., October Term, 1969

JOSEPH McKEIVER AND EDWARD TERRY,
Appellants,

v.

PENNSYLVANIA

APPEAL from the Supreme Court of the Commonwealth of Pennsylvania, Eastern District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the Appellate docket as No. 1755. The case is placed on the summary calendar and set for oral argument with No. 1441.

June 29, 1970

Supreme Court of the United States

No. 2300 Misc., October Term, 1969

JOSEPH MCKEIVER AND EDWARD TERRY,
Appellants,

v.

PENNSYLVANIA

ON CONSIDERATION of the motion of the appellants for leave to proceed in forma pauperis herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 29, 1970

SEP 2 1970
E. ROBERT SEAVER, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 322

JURIS. STATEMENT NOT PRINTED

JOSEPH McKEIVER
and
EDWARD TERRY,

Appellants,

v.

PENNSYLVANIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

DANIEL E. FARMER
JOHN S. ROBERTS, JR.
PETER W. BROWN
HARVEY N. SCHMIDT

Community Legal Services, Inc.
313 South Juniper Street
Philadelphia, Pennsylvania 19107

Attorneys for Appellants

JAMES O. FREEDMAN

3400 Chesnut Street
Philadelphia, Pa. 19104

Of Counsel

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT	
I. Jury Trials are Essential to Fundamental Fairness in Juvenile Delinquency Proceedings	7
II. The Rehabilitative Capabilities of the Juvenile Court Will Not Be Compromised By Jury Trials	17
A. The Rehabilitative Functions of the Juvenile Court Will Not Be Harmed by Jury Trials in the Adjudicatory Hearing	17
B. The Juvenile Court Has Not and Cannot Accomplish Its Rehabilitative Goal	20
C. Trial By Jury Will Not Impose an Undue Administrative Burden on Juvenile Courts Nor Delay Disposition Adversely to Rehabilitation	23
CONCLUSION	25

TABLE OF CITATIONS

Cases:

Baldwin v. New York, 90 S. Ct. 1886 (1970) 16

Bloom v. Illinois, 391 U.S. 194 (1968) 16

Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968) 9

Conover v. Montemuro, 304 F. Supp. 259 (E.D. Pa. 1969) ... 13

DeBacker v. Brainard, 396 U.S. 28 (1969) 7, 17

Duncan v. Louisiana, 391 U.S. 145 (1968) 6, 8, 12, 14, 15, 16

	Page
Green v. United States, 356 U.S. 165 (1958)	24
Hernandez v. Texas, 347 U.S. 475 (1954)	13
In re Bethea, 215 Pa. Super. 75, 257 A.2d 368 (1969)	10
In re Gault, 387 U.S. 1 (1967)	*passim*
In re Winburn, 32 Wis. 2d 152, 145 N.W.2d 178 (1966)	9
In re Winship, 397 U.S. 358 (1970)	5, 6, 7, 9, 15
Norris v. Alabama, 294 U.S. 587 (1935)	13
People v. Garbutt, 17 Mich. 9 (1868)	14
Shapiro v. Thompson, 394 U.S. 618 (1969)	24
State v. Arenas, ___ Ore. ___, 453 P.2d 915 (1969)	17
Terry Appeal, 438 Pa. 339, 265 A.2d 350 (1970)	1, 4, 22
Williams v. Florida, 90 S. Ct. 1893 (1970)	16
Witherspoon v. Illinois, 391 U.S. 510 (1968)	13
Statutes:	
Federal:	
28 U.S.C. § 1257(2) (1964)	2
State:	
Colo. Rev. Stat. Ann. § 37-19-24 (1965 Perm. Cum. Supp.)	19
Kan. Stat. Ann. § 38-808 (Supp. 1969)	19
Mass. Ann. Laws ch. 119, § 56 (1965)	19
Mich. Comp. Laws Ann. § 712A.17 (1968)	19
Mont. Rev. Codes Ann. § 10-604.1 (Supp. 1969)	19
Okla. Stat. Ann. tit. 10, § 1110 (Supp. 1969)	19
Pa. Const. art. V, § 5	3
Pa. Const. Schedule to art. V, § 16	3
Pa. Stat. Ann. tit. 11, § 243 (1965)	9
Pa. Stat. Ann. tit. 11, § 246 (1965)	13
Pa. Stat. Ann. tit. 11, § 247 (1965)	3
Pa. Stat. Ann. tit. 11, § 250 (1965)	10, 13
Pa. Stat. Ann. tit. 18, § 4302 (1963)	4

Page

Pa. Stat. Ann. tit. 18, § 4704 (1963) 3

Pa. Stat. Ann. tit. 18, § 4708 (1963) 4

Pa. Stat. Ann. tit. 18, § 4807 (1963) 3

Pa. Stat. Ann. tit. 18, § 4817 (1963) 3

S.D. Comp. Laws Ann. § 26-8-31 (1967) 19

Rex. Rev. Civ. Stat. Ann. art. 2338-1, § 13 (b) (Supp. 1969) 19

Wis. Stat. Ann. 48.25 (2) (1957) 19

W. Va. Code Ann. § 49-5-6 (1966) 19

Wyo. Stat. Ann. § 14-108 (c) (1965) 19

Foreign:

Magistrates' Courts Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 20 19

Miscellaneous:

Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt*, 68 *Mich. L. Rev.* 567 (1970) 10, 11, 20

Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 *U. Pa. L. Rev.* 1171 (1966) 10, 11

Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law*.1 *Fam. L.Q.*, Dec. 1967, at 1 . . . . . 19, 24

F. Allen, The Borderland of Criminal Justice (1964) 21

Fels Institute of State and Local Government of the University of Pennsylvania, A Plan for Juvenile Detention Facilities in Philadelphia (1966) 9

Handler and Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice, 1966 Law & Contemp. Prob.* 13

Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7 . . . 10, 11, 13, 19, 24

H. James, Children in Trouble: A National Scandal (1969) 20

H. Kalven and H. Zeisel, American Jury (1966) 15

Page

Ketcham, Guidelines from Gault: Revolutionary Requirements and Reappraisal, 53 Va. L. Rev. 1700 (1967) 12

Ketcham, *The Need for Law and Order in the Juvenile Court: Some Unanswered Questions*, 20 *J. Legal Ed.* 578 (1968) 19, 21

Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 *Crim. & Deling.* 97 (1961) 9, 10, 11

Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, *Boston U. L. Rev.* 62 (1969) 11

Note, *Juvenile Deliquents: The Police, State Courts, and Individualized Justice*, 79 Harv. L. Rev. 775 (1966) 11, 13, 19, 24

Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281 (1967) 10, 19

Paulsen, *Fairness to the Juvenile Offender*, 41 *Minn. L. Rev.* 547 (1957) 18

Paulsen *Kent v. United States: The Constitutional Context* of Juvenile Cases, 1966 Sup. Ct. Rev. 167 18

161 Philadelphia Legal Intelligencer, Sept. 16, 1969, at 1 9

Platt and Friedman, *The Limits of Advocacy: Occupational Hazards in the Juvenile Court*, 116 *U. Pa. L. Rev.* 1156 (1968) 11, 21

P. Tappan, Crime, Justice and Correction (1960) 10, 11

Sheridan, *Juvenile Court Intake*, 2 *J. Family Law* 139 (1962) 13

Task Force on Juvenile Delinquency, The President's Commission on Law Enforcement and Administration of Justice, Juvenile Delinquency and Youth Crime (1967) ... *passim*

The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) 12, 14, 19, 20, 23

T. Sellin and M. Wolfgang, Delinquency in a Birth Cohert, Center for Studies in Criminology and Criminal Law of the University of Pennsylvania (Mimeo 1970) 21

U.S. Department of Commerce, Statistical Abstract of the United States (1969) 23

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 322

JOSEPH McKEIVER
and
EDWARD TERRY,
Appellants,

v.

PENNSYLVANIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 438 Pa. 339, 265 A.2d 350 (1970).

JURISDICTION

On May 4, 1970, the Supreme Court of Pennsylvania filed an opinion and order sustaining the validity of Section 5 of the Pennsylvania Juvenile Court Law against appellants' claim of repugnancy to the United States Constitu-

tion. On May 28, 1970, appellants filed and served notices of appeal to this Court. On June 29, 1970, this Court noted probable jurisdiction over the appeal. (A. 48) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) (1964).

QUESTION PRESENTED

Is the provision of the Pennsylvania Juvenile Court Law prohibiting jury trials in juvenile delinquency proceedings void for repugnancy to the sixth and fourteenth amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The first section of the fourteenth amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

> property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 of the Pennsylvania Juvenile Court Law, Act of June 2, 1933, [1933] Pa. Stat. 1433, Pa. Stat. Ann. tit. 11, § 247 (1965) provides:

> Except as hereinafter provided, the court shall hear and determine all cases affecting children arising under the provisions of this act without a jury. If an adult coming before the court is charged with an offense for which he is entitled to a trial by jury, and if he so demand, the case shall be returned by the judge of the court to the proper court for trial.

STATEMENT

JOSEPH McKEIVER

On October 17, 1968, Joseph McKeiver, age fifteen, appeared for the first time before the Family Division of the Court of Common Pleas of Philadelphia,[1] charged with the felonies of robbery, larceny and receiving stolen goods as acts of juvenile delinquency. Pa. Stat. Ann. tit. 18, §§ 4704, 4807, 4817 (1963). Appellant moved for a jury trial on federal constitutional grounds, but the motion was denied. Appellant was then tried without a jury. The evidence consisted solely of the testimony of the alleged robbery victims, two teenage boys about the same ages as appellant. Their testimony tended to show that twenty-five

---

[1] In considering the record in this appeal it should be noted that the jurisdiction provided for by the Pennsylvania Juvenile Court Law was originally exercised by the judges of the County Court of Philadelphia. By constitutional amendment, effective January 1, 1969, the trial courts of Pennsylvania were consolidated into one Common Pleas Court and the Juvenile Court jurisdiction is now exercised by the judges of the Family Division of the Court of Common Pleas. *Pa. Const.*, art. V, § 5 and Schedule to art. V, § 16.

cents was taken by a boy whom the witnesses subsequently identified as appellant. The testimony had inconsistencies and, on that account, was described by the court below as "weak." 438 Pa. at 341 n.1, 265 A.2d at 351. The case was the kind that would have profited from the healthy skepticism of a jury. Appellant was convicted by the court.

On November 7, 1968, appellant filed a timely petition for rehearing on the ground, *inter alia*, that the court had violated appellant's rights under the Due Process clause of the fourteenth amendment by denying him a jury trial. After briefs and oral argument, the court entered an order on February 13, 1969, denying appellant's petition. An appeal was taken to the Superior Court of Pennsylvania, which, on August 7, 1969, entered a per curiam order, without opinion, affirming the court below. An appeal, consolidated with that of Edward Terry, was taken from the order of the Superior Court to the Supreme Court of Pennsylvania, which, on May 4, 1970, in a single opinion, affirmed the orders of the Superior Court.

EDWARD TERRY

On January 20, 1969, Edward Terry, age fifteen, appeared before the Family Division of the Court of Common Pleas of Philadelphia (Juvenile Court), charged with assault and battery on a police officer and conspiracy as acts of juvenile delinquency.[2] Appellant moved for a jury trial, but the motion was not ruled upon and the case was several times continued, ultimately to March 27, 1969. On that date, appellant renewed his motion for a jury trial, but the motion was denied.

---

[2]Under Pennsylvania law, assault and battery and conspiracy are each misdemeanors punishable by imprisonment up to two years. *Pa. Stat. Ann.* tit. 18, §§ 4708, 4302 (1963)

The evidence tended to show that appellant was one of a group of boys watching two small boys fighting. A police officer happened upon the rumpus, stopped the fight, and ordered the onlookers to disperse. The testimony of the arresting officer and that of an eyewitness conflicted as to what happened, but in any event, there was at least some "wrestling" between appellant Terry and the arresting officer which resulted in Terry's being arrested by the officer on the following day. A jury might have resolved the testimonial conflict in appellant's favor, but the court found appellant guilty and ordered him incarcerated in a state correctional institution. An appeal was taken from that order to the Superior Court of Pennsylvania, which entered, on August 7, 1969, a per curiam order, without opinion, affirming the court below. An appeal, consolidated with that of Joseph McKeiver, was taken from the order of the Superior Court to the Supreme Court of Pennsylvania, which, on May 4, 1970, in a single opinion, affirmed the orders of the Superior Court.

SUMMARY OF THE ARGUMENT

In *In re Gault*, 387 U.S. 1 (1967), this Court subjected the adjudicatory phase of juvenile delinquency proceedings to the requirements of due process, holding that due process required at least that juveniles be given adequate notice of the charges against them, be represented by counsel, be afforded the fifth amendment rights against self-incrimination, and be granted the rights of confrontation and cross-examination. The Court indicated that due process might require additional safeguards in juvenile delinquency proceedings. Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court held that due process requires that the standard for adjudication of delinquency for violations of the criminal law be proof beyond a reasonable doubt.

The process by which juveniles are adjudicated delinquents is substantially similar to the adult criminal pro-

cess: a child is charged with crime, tried under the same basic rules used in the adult criminal process, and, if convicted, stigmatized like an adult criminal and imprisoned in institutions as bad as or worse than a prison for adult criminals. The juvenile court prosecutor and judge play the same role as they do in an adult criminal court. Jury trials are therefore essential to protect juveniles from the "corrupt or overzealous prosecutor" and the "compliant, biased, or eccentric judge", which protection was basic to this Court's holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the right to jury trial was essential to fundamental fairness in state criminal prosecutions for serious offenses and therefore required by due process. Indeed, trial by jury may be more essential to fundamental fairness in juvenile court proceedings because of the greater discretion in the juvenile system as to when to arrest, when to prosecute, and the severity of the penalty to impose.

The attributes of a jury make it a more accurate factfinder and less likely to convict where there is reasonable doubt than a single judge. Trial by jury is therefore necessary to afford that high degree of protection against conviction of the innocent which this Court found essential to fundamental fairness in juvenile delinquency proceedings in *In re Winship*, 397 U.S. 358 (1970).

The process by which juvenile delinquency is adjudicated and dealt with is a system in which juveniles are charged with crime, are tried in the same type of factfinding process as adult criminals, and are liable upon conviction to incarceration in correctional institutions as bad as or worse than adult prisons. This brings juvenile delinquency proceedings—whether or not their goal is rehabilitation—within the ambit of the "criminal prosecutions" for which the sixth amendment guarantees the right to trial by jury.

Should the importance of jury trials to fundamental fairness be balanced against the rehabilitative purpose of the juvenile court, the clear demonstration required that jury trials would interfere with rehabilitation cannot be made.

Rehabilitation is not attempted and does not occur during the adjudicatory hearing—the factfinding phase of the juvenile court process. Therefore, jury trials—which affect only the adjudicatory hearing—cannot adversely affect rehabilitation. Moreover, the juvenile court's goal of rehabilitation, which *Gault* requires to be judged in terms of accomplishments rather than promises or hopes, has not been achieved. Finally, the experience in jurisdictions statutorily granting the right to trial by jury indicates that the right will not impose a significant burden upon juvenile courts nor delay adjudication adversely to rehabilitation.

ARGUMENT

I. JURY TRIALS ARE ESSENTIAL TO FUNDAMENTAL FAIRNESS IN JUVENILE DELINQUENCY PROCEEDINGS.

In *In re Gault*, 387 U.S. 1 (1967), this Court subjected the adjudicatory phase of juvenile delinquency proceedings to the requirements of due process, holding that due process required at least that juveniles be given adequate notice of the charges against them, be represented by counsel, be afforded the fifth amendment right against self-incrimination, and be granted the rights of confrontation and cross-examination. The Court indicated in *Gault* that due process might require additional safeguards in juvenile delinquency proceedings, but left elaboration of those requirements to a case by case determination of whether the asserted requirement was fundamental to fairness in juvenile delinquency proceedings. Thus, in *In re Winship*, 397 U.S. 358 (1970), the Court held that due process requires that the standard of proof for adjudication of delinquency for violations of the criminal law be proof beyond a reasonable doubt of every fact constituting the crime charged.

In *DeBacker v. Brainard*, 396 U.S. 28 (1969), the Court did not reach the question—which this appeal presents—of the right of juveniles to trial by jury, but Justices Douglas

and Black, dissenting, stated their view that due process requires that juveniles be afforded the right to trial by jury. 396 U.S. at 33-38. The present appeal differs from *DeBacker* in that both appellants were tried after May 20, 1968, the date of the Court's holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the right to a jury trial for serious offenses is fundamental to a fair trial in adult criminal proceedings. Appellants submit that a jury trial is fundamental to a fair trial in juvenile delinquency proceedings and therefore required by due process.

Appellants were tried in delinquency proceedings typical of those afforded by most of the states[3] and substantially similar to a criminal trial. Delinquency proceedings against juveniles are initiated by a petition charging a violation of the Penal Code in the conclusory language of an indictment.[4] A juvenile who is detained prior to trial is held in a building substantially similar to an adult prison. Indeed, juveniles over sixteen in Philadelphia *are* held in the cells of an adult prison.[5]

---

[3]The development of juvenile courts is traced in *In re* Gault, 387 U.S. 1, 14-17 (1967), and in *Task Force on Juvenile Delinquency, the President's Commission on Law Enforcement and Administration of Justice, Juvenile Delinquency and Youth Crime* 1-4 (1967) [hereinafter cited as *Crime Commission Task Force*].

[4]The delinquency petition filed against Joseph McKeiver alleged that he "did, on or about 4/11/68 at or about 1:55 P.M., at or near 3300 W. Diamond Street, rob the complainant, Reggio James (sic), of articles of personal property. The boy is charged with Robbery, Larceny, and Receiving Stolen Goods." (A. v.). The delinquency petition filed against Edward Terry alleged that he "did on or about 8-31-68 at or about 7:05 p.m. in company with others act in a disorderly manner while at or near Parkside and Lindenwood Streets strike Officer Sweeney #456. (sic) The boy is charged with assault and battery on officer and conspiracy." (A. vii).

[5]This is "Pennypack House," a euphemism for a block of cells in the "House of Correction," an adult prison. Juveniles continue to be confined in this prison despite the fact that the length of stay aver-

Defense counsel and the District Attorney bargain for guilty pleas in juvenile court just as they do in adult criminal court.[6] Motions to suppress evidence obtained in violation of the juvenile's fourth, fifth and sixth amendment rights are routinely heard and decided.[7] Each element of the crimes charged must be proved beyond a reasonable doubt in a hearing conforming to the due process mandates of *In re Winship*, 397 U.S. 358 (1970).[8] The usual rules of evidence as to relevancy, materiality, hearsay, and form of questioning are applied. The same common law defenses available in adult criminal proceedings are available in juvenile court. *E.g., In re Winburn*, 32 Wis. 2d 152, 145 N.W.2d 178 (1966) (insanity defense), and *Collins v. State*, 429 S.W.2d 650 (Tex. Civ. App. 1968) (double jeopardy).

Members of the public and press enter the courtroom and the delinquent's arrest and prior record may be reported in the newspapers.[9]

---

ages more than a month and despite the recommendation of a University of Pennsylvania study made in 1966, that such commitments immediately stop. *Fels Institute of State and Local Government of the University of Pennsylvania, A Plan for Juvenile Detention Facilities in Philadelphia* (1966) (Report of an official study commissioned by the City of Philadelphia). The practice of confining children in adult prisons is by no means limited to Philadelphia. Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 *Crim. & Delinq.*, 97, 108 (1961).

[6]This bargaining is usually for dropping counts or other delinquency petitions rather than for sentencing recommendations by the district attorney.

[7]Administrative Regulation of the Philadelphia Juvenile Court regarding, *inter alia*, motions to suppress. 161 Philadelphia Legal Intelligencer, Sept. 16, 1969, at 1.

[8]Each element of the criminal offense must be proven because a delinquent child is one who has "violated any law of the Commonwealth. . . ." *Pa. Stat. Ann.* tit. 11, § 243 (1965).

[9]The judges of the Philadelphia Juvenile Court exercise varying degrees of control over admission to the courtroom, but the press is generally admitted, and, on occasion, visiting high school students are

Once the judge finds a juvenile guilty, he may confine him in what amounts to a prison[10] until the juvenile's majority. Pa. Stat. Ann. tit. 11 § 250 (1965); *In re Bethea*, 215 Pa. Super. 75, 257 A.2d 368 (1969). It cannot be emphasized too strongly that when a juvenile stands before a juvenile court in this country he risks commitment, often for a long term, to institutions that are as confining and degrading as adult prisons and which, in Professor Tappan's view, "differ but little in program and correctional impact from the nineteenth-century prison." P. Tappan, Crime, Justice and Correction 649 (1960):[11] The Task Force on Juvenile Delinquency of the President's Crime Commission stated:

> "There are things going on, methods of discipline being used in the State training schools of this coun-

---

admitted, presumably for the supposed deterrent value of the experience. The reports of arrests and dispositions which appear in the Philadelphia press may originate with the Philadelphia Police Department, which maintains juvenile records separate from those maintained by the Juvenile Court and not subject to its control. Such practices are not limited to Philadelphia. *In re* Gault, 387 U.S. 1, 24-25 (1967); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 *Colum. L. Rev.* 281, 285-86 (1967); Handler, *The Juvenile Court and the Adversary System*, 1965 *Wis. L. Rev.* 7, 13; The Unfulfilled Promise of the Juvenile Court, supra note 5, at 102-04.

[10] For example, the State Correctional Institution at Camp Hill, to which juveniles from Philadelphia are sometimes sent, is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire and guard towers. It has been described by a former juvenile court judge as "a maximum security prison for adjudged delinquents. . . ." *In re* Bethea, 215 Pa. Super. 75, 76, 257 A.2d 368, 369 (1969) (Hoffman, J.).

[11] *Accord*, Cohen, *The Standard of Proof in Juvenile Proceedings: Gault Beyond a Reasonable Doubt*, 68 *Mich. L. Rev.* 567, 572 n.20 (1970); Comment, *Criminal Offenders in the Juvenile Court: More Brickbats and Another Proposal*, 114 *U. Pa. L. Rev.* 1171, 1215 (1966); *The Juvenile Court and the Adversary System: Problems of Function and Form*, *supra* note 9, at 12-13; *The Unfulfilled Promise of the Juvenile Court*, *supra* note 5, at 107-08.

> try that would cause a war
> his job if he used them on den of Alcatraz to lose
> practices that are a daily occis prisoners. There are
> State training schools that currence in some of our
> prisons or penitentiaries ore not permitted in the
> Task Force on Juvenile Del the same States. . . ."
> Commission on Law Enforcnquency, the President's
> tion of Justice, *Juvenile D*ement and Administra-
> *Crime* 8 (1967) (quoting a *linquency and Youth*
> inafter cited as *Crime Com*leading penologist) [here-
> *mission Task Force*]

Moreover, the stigma that a juve tion—reflected in part by great dnile suffers upon convic-ficulty in securing em-ployment and entering the armed mates that resulting from convictervies—closely approxi-proceeding.[12] on in an adult criminal

The reality of the juvenile cour tem in which a child is charged w process, then, is a sys-same basic rules used in the adultth crime, tried under the convicted, stigmatized like an adu criminal process, and, if in what is equal to or worse t criminal and imprisoned Force on Juvenile Delinquency o an adult jail. The Task mission summarized the juvenile the National Crime Com-

> In theory the juvenile co ourt process thus:
> rehabilitative rather than t was to be helpful and
> unative. In fact the dis-

---

[12] *In re* Gault, 387 U.S. 1, 24-25 (1
venile Proceedings, supra note 11, at 67); *Standard of Proof in Ju-a Gateway to Rehabilitation in the Ju*3-74; Lipsitt, *Due Process as* ton U. L. Rev. 62, 67-70 (1969); Plat*enile Justice System*, 49 Bos-*Advocacy: Occupational Hazards in* and Friedman, *The Limits of* Rev. 1156, 1160-61 (1968); *Crime C uvenile Court*, 116 *U. Pa. L.* 92-93, 420-21; *Rights and Rehabilit mmission Task Force*, at 39, *supra* note 9, at 286-89; *Criminal O ion in the Juvenile Courts,* *supra* note 11, at 1216-17; Note, *Juv enders in the Juvenile Court:* *State Courts, and Individualized Just ile Delinquents: The Police,* 85, 799-801 (1966); *The Juvenile Co* 79 *Harv. L. Rev.* 775, 784-*supra* note 9, at 13-14; *The Unfulfille rt and the Adversary System,* *supra* note 5, at 102-03; *P. Tappan, Promise of the Juvenile Court,* 392 (1960). *Crime, Justice and Correction*

> tinction often disappears. . . . In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services–by society generally–as a criminal. Crime Commission Task Force, at 9.

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court held that trial by jury was "fundamental" to our system of justice because it gives the accused:

> [A]n inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. 391 U.S. at 156.

The prosecutor and judge have the same roles in determining guilt in the juvenile court that they have in an adult criminal court. The prosecutors and judges in juvenile court are as subject to human failings as their counterparts in the adult criminal court. Fundamental fairness therefore demands that an accused juvenile receive the same safeguard against the possibility of a "corrupt or overzealous prosecutor" and a "compliant, biased, or eccentric judge" as *Duncan* gives to an adult accused.[13]

Indeed, jury trials may be more essential to fundamental fairness in juvenile proceedings than they are to fundamental fairness in adult criminal proceedings, for in juvenile proceedings the state exercises broader discretion about when to arrest,[14] when to prosecute,[15] and the severity of

---

[13]The President's Crime Commission reported a recent survey of juvenile court judges that revealed that "half had no undergraduate degree; a fifth had received no college education at all; a fifth were not members of the bar." *The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 80 (1967).

[14]*Crime Commission Task Force*, at 12-14. There is no established constitutional requirement limiting the arrest of juveniles to situations in which there is probable cause. Ketcham, *Guidelines from Gault: Revolutionary Requirements and Reappraisal*, 53 *Va.* L. *Rev.* 1700, 1715 (1967).

[15]Both the police and "intake" personnel exercise standardless and unreviewable discretion as to whom to prosecute. *Crime Commission*

the penalty to impose.[16] This discretion has been abused. *In re Gault*, 387 U.S. 1, 24-25 (1967).

But it is not only as a protection against biased, eccentric, or overzealous judges and prosecutors that juries are fundamental to factfinding accuracy. The averaging of life experiences and attitudes, the balancing of biases, and the opportunity for reflection and discussion contribute to more accurate factfinding by a jury than by a single judge.[17] This was early recognized in our legal history:

> The law has established this tribunal because it is believed, that, from its numbers, the mode of their se-

---

Task Force, at 12-18, 88, 419-22; Juvenile Delinquents: The Police, State Courts, and Individualized Justice, supra, note 12, at 776-90, 804; Handler and Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 1966 *Law & Contemp. Prob.* 377, 394-400; *The* Juvenile Court and the Adversary System, supra note 9, at 11, 19; Sheridan, *Juvenile Court Intake*, 2 J. *Family Law* 139 (1962). In Pennsylvania, "any citizen" may file a delinquency petition, *Pa. Stat. Ann.* tit. 11, § 246 (1965), but in practice an intake interviewer employed by the Juvenile Court usually makes this decision; the overbroad scope of his discretion to do so is the subject of constitutional attack. Conover v. Montemuro, 304 F. Supp. 259 (E.D. Pa. 1969). In Philadelphia and many other jurisdictions a delinquency petition will invariably be filed if the complainant is insistent. Privacy in Welfare, supra, at 397. Thus, one of the few constraints on the intake interviewer's discretion favors public indignation over the child's best interest.

[16] *Pa. Stat. Ann.* tit. 11, § 250 (1965), gives the court sentencing choices ranging from doing nothing, through probation, and including commitment to a state correctional institution.

[17] The contribution of this aspect of the jury to factfinding accuracy has been recognized by this Court in its decisions seeking to ensure fair representation on the jury. *E.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968); Hernandez v. Texas, 347 U.S. 475 (1954); Norris v. Alabama, 294 U.S. 587 (1935). This becomes especially important when provision of jury trials entails inclusion of factfinders familiar with the Negro poverty subculture from which come most juvenile delinquents in urban areas and in the context of which are found the events and witnesses.

> lection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of a circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. *People v. Garbutt*, 17 Mich. 9, 27 (1868)

The right to jury trial avoids other threats to factfinding accuracy posed by a judge sitting as the sole trier of fact: the influence of inadmissible and prejudicial evidence, the uncritical acceptance of the testimony of witnesses who become known to the judge through regular appearances, and the consideration during the adjudicatory hearing of the probation department report on the juvenile's record and social history.[18]

In *Duncan* this Court noted that one of the functions of a jury was to give an adult

> the common-sense judgment of a jury [in preference] to the more tutored but perhaps less sympathetic reaction of the single judge. . . . *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

The juvenile court process approximates a penal system because it adjudicates whether or not a crime has been committed and may order incarceration upon an affirmative adjudication. The President's Crime Commission concluded:

> [I]t has become clear that in fact the same purposes that characterize the use of criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders too. *The Challenge of Crime in a Free Society*, supra note 13, at 80.

---

[18]In the court below, the Commonwealth argued that juries would not contribute to factfinding accuracy. This argument quarrels with the wisdom of the suppositions underlying the sixth amendment's guarantee of the right to trial by jury, and it therefore has been answered by the Court's decision in Duncan v. Louisiana, 391 U.S. 145 (1968).

It is therefore equally essential to fundamental fairness in delinquency proceedings that a juvenile be able to avail himself of the protection of a jury for a more "sympathetic" and less "tutored" reaction than that of a judge.

In *In re Winship*, 397 U.S. 358 (1970), this Court held that due process requires that the standard of proof for adjudication of juvenile delinquency upon charges of commission of a crime be proof beyond a reasonable doubt of every element of the crime. This holding followed from the Court's conclusion that only proof beyond a reasonable doubt assured that convictions would be based upon the high degree of factfinding accuracy which this Court found essential to fundamental fairness in both juvenile and adult proceedings. It has been demonstrated empirically that juries are more likely than judges to acquit upon reasonable doubt. H. Kalven and H. Zeisel, *American Jury* 187 (1966). This apparently reflects the common sense observation that when the facts are in doubt, it is more difficult to get agreement from several minds than from one. Professors Kalven and Zeisel have said:

> If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system. *American Jury*, supra, at 189-90.

Jury trials are as necessary as the reasonable doubt standard to the fundamental value our society places upon protecting the innocent against conviction. Thus, the same principle which underlies this Court's holding in *Winship* dictates granting the right to jury trial, for trial by jury is, equally with proof beyond a reasonable doubt, "a prime instrument for reducing the risk of convictions resting on factual error." 397 U.S. at 363.

The court below sought to avoid the impact on juvenile delinquency proceedings of *Duncan v. Louisiana*, 391 U.S. 145 (1968), by pointing to this Court's dictum that:

> A criminal process which was fair and equitable but used no juries is easy to imagine. It would make

> use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. 391 U.S. at 150 n. 14.

The Commonwealth claims that the juvenile court process is such an alternative imaginable system. But this Court recently observed that:

> [T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group's determination of guilt or innocence. *Williams v. Florida*, 90 S. Ct. 1893 (1970).

A judge sitting as the sole trier of fact is not a safeguard against biased, overzealous, corrupt or eccentric prosecutors or judges; he cannot substitute for the more sympathetic reaction of representatives of the community; he cannot offer the factfinding accuracy of a balancing of personalities and an opportunity for discussion. Clearly, a juvenile court without a jury is not the "fair and equitable" system to which the Court made abstract reference in *Duncan*.[19]

---

[19] Because appellants were charged with serious crimes and were exposed to the risk of confinement for up to six years, there is no doubt that they were charged with serious offenses within the meaning of Duncan v. Louisiana, 391 U.S. 145 (1968). The Commonwealth apparently does not deny that appellants would be entitled to a jury trial if this Court should hold that *Duncan* applies to juvenile delinquency proceedings. Appellants contend that the relevant criterion of whether juveniles charged with delinquency must be afforded the right to jury trial is the duration of incarceration to which the juvenile may be subject, and that where that exposure is greater than six months, the right to jury trial must be afforded. Duncan v. Louisiana, 391 U.S. 145 (1968); Bloom v. Illinois, 391 U.S. 194 (1968); Baldwin v. New York, 90 S. Ct. 1886 (1970).

II. THE REHABILITATIVE CAPABILITIES OF THE JUVENILE COURT WILL NOT BE COMPROMISED BY JURY TRIALS.

Appellants have demonstrated that the process by which juvenile delinquency is adjudicated and dealt with is essentially a system in which juveniles are charged with commissions of crime, are tried in the same type of factfinding process as adult criminals, and are liable, upon conviction, to incarceration in correctional institutions that are as bad as or worse than adult prisons. This demonstration, in appellants' view, brings juvenile delinquency proceedings within the ambit of the "criminal prosecutions" for which the sixth amendment (applicable to state prosecutions after *Duncan*) guarantees the right to trial by jury.[20] "The balancing of the rehabilitative purpose of the juvenile proceeding with the due process requirement of a jury trial is a matter for a future Constitutional Convention." *DeBacker v. Brainard*, 396 U.S. 28, 38 (1969) (Douglas, J., dissenting). If, despite the essentially penal character of the juvenile court system, the rehabilitative purpose of the juvenile court is to be invoked to deny a right found fundamentally necessary in *Duncan*, there must be a clear demonstration—not merely assertion or conjecture—that the juvenile court system is in fact rehabilitative and that jury trials would substantially interfere in rehabilitation. No such demonstration can be made.

A. The Rehabilitative Functions of the Juvenile Court Will Not Be Harmed by Jury Trials in the Adjudicatory Hearing.

The argument that jury trials will interfere with rehabilitation is based upon a fundamental misunderstanding of the

---

[20]The argument that the goal of rehabilitation justifies a lesser standard of due process for juveniles than for adult criminals is made further dubious by the fact that rehabilitation is also one of the stated goals of the adult criminal system. *See, e.g.*, State v. Arenas, ____ Ore. ____, ____, 453 P.2d 915, 918 (1969).

juvenile court process. The juvenile court's function is seperated into factfinding, which occurs at the adjudicatory hearing, and rehabilitation, which occurs outside of the adjudicatory hearing. Jury trials, which affect only the adjudicatory hearing, could not possibly interfere with the juvenile court's efforts at rehabilitation because rehabilitation does not take place at the adjudicatory hearing. Thus, Dean Monrad Paulsen, a leading scholar of juvenile court law, has said:

> Certainly, too, the reformers were mistaken about the opportunity for treatment presented by a few minutes in court. Not many today would agree that a judge who puts his arm around a boy gains "immensely in the effectiveness of his work." If our methods work changes in the characters of delinquent children, they must embrace more sustained measures over a period of time. Paulsen, Kent v. United States: The Constitutional Context of Juvenile Cases, 1966 *Sup. Ct. Rev.* 167, 186.

The argument against granting jury trials and other due process rights for juveniles is sometimes stated in terms of "formality." Trial by jury, it is argued, will introduce "formality" into delinquency proceedings, and "formality" is said to be detrimental to rehabilitation.[21] The argument is based upon a false premise. Trial by jury will introduce "formality" into only the adjudicatory hearing, the stage at which rehabilitation does not occur. Moreover, there is substantial support for the view that increased formality in the adjudicatory hearing has a positive effect on subsequent ef-

---

[21] This view was taken by the Task Force on Juvenile Delinquency of the President's Commission on Law Enforcement and the Administration of Justice. *Crime Commission Task Force* at 38. The Commonwealth placed much reliance on this in the court below. However, the statement, made prior to *In re* Gault, 387 U.S. 1 (1967), is based upon the opinion in 1957 of Dean Monrad Paulsen, who subsequently changed his mind. *Compare* Paulsen, *Fairness to the Juvenile Offender,* 41 *Minn.* L. *Rev.* 547, 559 (1957), *with* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases,* 1966 *Sup. Ct. Rev.* 167, 186

forts at rehabilitation.[22] Dorsen and Rezneck have suggested that jury trials in particular would have a positive therapeutic effect:

> [T]rial by jury is not a matter of form—like a judge's robe or gavel—but of substance, the product of long historical experience and expressing a profound judgment by our legal system about the means of adjudicating criminal behavior. If it thereby introduces an aura of formality or solemnity, it is formality desirable in a matter of such consequence. Further, we submit that such formality is more likely to infuse a juvenile with respect for the legal system than to heighten his feelings of alienation and in that sense may ultimately be therapeutic. Dorsen and Rezneck, In re Gault and the Future of Juvenile Law, *1 Fam. L.Q.*, December 1967, 1, 23.

Finally, it is significant that eleven states[23] and England,[24] whose juvenile court processes are based upon the

---

[22] *In re* Gault, 387 U.S. 1, 26 (1967); Ketcham, *The Need for Law and Order in the Juvenile Court: Some Unanswered Questions*, 20 J. *Legal Ed.* 578, 581-82 (1968); *Crime Commission Task Force* at 421; *Rights and Rehabilitation in the Juvenile Courts, supra* note 9, at 284-85; *The Challenge of Crime in a Free Society, supra* note 13, at 85; *Juvenile Delinquents; The Police, State Courts, and Individualized Justice, supra* note 12, at 791-92; *The Juvenile Court and the Adversary System, supra* note 9, at 19-20.

[23] *Colo. Rev. Stat. Ann.* § 37-19-24 (1965 Perm. Cum. Supp.); *Kan. Stat. Ann.* § 38-808 (Supp. 1969); *Mass. Ann. Laws* ch. 119, § 56 (1965) (Child adjudged delinquent may appeal as of right to Superior Court where he may have a jury trial upon demand); *Mich. Comp. Laws Ann.* § 712A.17 (1968); *Mont. Rev. Codes Ann.* § 10-604.1 (Supp. 1969); *Okla. Stat. Ann.* tit. 10, § 1110 (Supp.1969); *S.D. Comp. Laws Ann.* § 26-8-31 (1967); *Tex. Rev. Civ. Stat. Ann.* art 2338-1, § 13(b) (Supp. 1969); *W. Va. Code Ann.* § 49-5-6 (1966); *Wis. Stat. Ann.* § 48.25(2) (1957); *Wyo. Stat. Ann.* § 14-108(c) (1957).

[24] Magistrates' Courts Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2,c. 55, § 20 (For juveniles over fourteen years of age charged with indictable offenses).

goal of rehabilitation, have by statute granted juveniles the right to trial by jury. These jurisdictions have apparently concluded that jury trials at the adjudicatory hearing do not interfere with efforts at rehabilitation at other stages of the juvenile court process.

B. The Juvenile Court Has Not And Cannot Accomplish Its Rehabilitative Goal.

Appellants have demonstrated that granting the right to jury trials in juvenile delinquency proceedings will not interfere with the juvenile court's efforts at rehabilitation. Pursuit of the balancing of the fundamental right to jury trial against the asserted rehabilitative goal of the juvenile court requires, as this Court made clear in *Gault*, an appraisal of the juvenile court's accomplishments, not its promises, pretensions, or hopes.

The evidence that the juvenile court does not rehabilitate is overwhelming.

This Court recognized in *Gault* and *Winship* that the rehabilitative mission of juvenile courts has been largely unsuccessful. The President's Crime Commission concluded:

> Studies conducted by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of delinquency, or in bringing justice and compassion to the child offender. The *Challenge of Crime in a Free Society*, supra note 13, at 80.

This view is widely supported.[25] That the juvenile court has not succeeded at rehabilitation has received striking ob-

---

[25] *The Standard of Proof in Juvenile Proceedings, supra* note 11, at 572-73; *H. James, Children in Trouble: A National Scandal* 17-43

jective confirmation from a study made in Philadelphia by Professors Thorsten Sellin and Marvin Wolfgang of the University of Pennsylvania.[26] The study, undertaken for the National Institute of Mental Health, was based upon analysis of the history of 9,945 male subjects born in 1945:

> It appears that the criminal justice system has been able to isolate the hard core offender fairly well. Unfortunately, the product of this encounter with sanctioning authorities is far from desirable. Not only do a greater number of those who receive punitive treatment (institutionalization, fine, or probation) continue to violate the law, but they also commit more serious crimes with greater rapidity than those who experience a less intimate contact with the judicial and correctional systems. Thus we must conclude that the juvenile justice system at its best, has no effect on the subsequent criminal behavior of adolescent boys and at its worst, has a deleterious effect on future behavior.[27]

The facts of the instant case illustrate one of the reasons why the juvenile court has been so unsuccessful at rehabilitation. At the dispositional hearing following the adjudication of delinquency in Joseph McKeiver's trial, the court's inquiry into McKeiver's personality and into the possible dispositional alternatives consisted of little more than the judge observing that Mrs. McKeiver did not have "the kind

---

(1969); *The Limits of Advocacy, supra* note 12, at 1160; *The Need for Law and Order in the Juvenile Court, supra* note 22, at 578-80; *Crime Commission Task Force*, at 6-9; 93-95; *F. Allen, The Borderland of Criminal Justice* 43-61 (1964).

[26] *T. Sellin and M. Wolfgang, Delinquency in a Birth Cohort*, Center for Studies in Criminology and Criminal Law of the University of Pennsylvania (Mimeo 1970)(Available upon request from Dr. Saleem) Shah, Chief, Center for Studies in Crime and Delinquency, National Institute of Mental Health)

[27] *Id.* at Chapter XIV, 13-14.

of home that is conducive to raising good, healthy children" (A. 17); that having children by a paramour was reflected in her "57 percent" "batting average" in juvenile court (A. 17); and that "[t]here must have been a problem in school." (A. 17). In the dispositional hearing of Edward Terry, a different juvenile judge told Terry that he was a "healthy, good looking boy," but his "activity" was "inexcusable" and was helping to "drive this city [Philadelphia] further down." (A. 32). Such observations are hardly a serious or scientific effort to understand McKeiver or Terry or to set in motion a constructive process of rehabilitation.

The court below, while conceding that the juvenile court "has in many respects fallen far short of its goals," 438 Pa. at 349, 265 A.2d at 355, was "not yet convinced that the current practices do not contain the seeds from which a truly appropriate system can be brought forth." 438 Pa. at 349-50, 265 A.2d at 355.

The President's Crime Commission was much more pessimistic:

> But it is by no means true that a simple infusion of resources into juvenile courts and attendant institutions would fulfill the expectations that accompanied the court's birth and development. There are problems that go much deeper. The failure of the juvenile court to fulfill its rehabilitative and preventive promise stems in important measure from a grossly over-optimistic view of what is known about the phenomenon of juvenile criminality and of what even a fully equipped juvenile court could do about it. Experts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programs for the child. What research is making increasingly clear is that delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of the actions of

any judge, probation officer, correctional counselor, or psychiatrist.

* * *

The limitations, both in theory and in execution, of strictly rehabilitative treatment methods combined with public anxiety over the seemingly irresistible rise in juvenile criminality, have produced a rupture between the theory and the practice of juvenile court dispositions. While statutes, judges, and commentators still talk the language of compassion and treatment, it has become clear that in fact the same purposes that characterize the use of the criminal law for adult offenders—retribution, condemnation, deterrence, incapacitation—are involved in the disposition of juvenile offenders too. These are society's ultimate techniques for protection against threatening conduct; it is inevitable that they should be used against threats from the young as well as the old when other resources appear unavailing. *The Challenge of Crime in a Free Society*, supra note 13, at 80.

C. Trial By Jury Will Not Impose An Undue Administrative Burden On Juvenile Courts Nor Delay Disposition Adversely To Rehabilitation.

It has been suggested that trial by jury will heavily burden juvenile courts. The twelve jurisdictions that grant jury trials by statute have found the burden manageable despite the fact that several of them contain large metropolitan areas with heavy case volumes.[28] The fact is that very few jury trials are requested, even when the right is

---

[28] Denver, Colo., pop. 493,887; Detroit, Michigan, pop. 1,670,144; Houston, Texas, pop. 938,219; Milwaukee, Wis., pop. 741,324. *U.S. Department of Commerce, Statistical Abstract of the United States* 21-22 (1969) (1960 census data).

freely available.[29] Moreover, this Court has often made clear that the burden (and therefore expense) of affording a constitutional right is not a basis for denying recognition to the right. E.g., *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). As Justice Black has said:

> Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy. *Green v. United States*, 356 U.S., 165, 216 (1958) (dissenting opinion)

The Commonwealth also argued in the court below that the availability of jury trials would permit defense counsel to delay adjudication and disposition by waiting until the eve of trial to demand a jury, with adverse consequences upon rehabilitation. There is no objection, constitutional or otherwise, to conditioning the exercise of the right to a jury trial so as to avoid delay created by last minute demands. Moreover, as has already been demonstrated, juvenile courts carry out little or no rehabilitation with which such delay could interfere.

It may be that in practice jury trials will introduce some delay into adjudicatory hearings; if so, such delay will be salutory. Students of the juvenile court have critically noted the rapid, assembly line quality of proceedings in juvenile courts, especially in large cities.[30] In Los Angeles, for example, hearings averaged three minutes.[31] Counsel

---

[29] Dorsen and Rezneck, *In re Gault and the Future of Juvenile Law*, *1 Fam. L.Q.*, Dec. 1967, 1, 24; *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, *supra* note 12, at 793-94.

[30] *Crime Commission Task Force* at 94; *The Juvenile Court and the Adversary System*, *supra* note 9, at 12, 17.

[31] *Crime Commission Task Force* at 94.

for McKeiver was required by the court to proceed despite the fact that he had never before interviewed his client. (A. 1). And the transcripts in the instant case indicate that it took no more than fifteen minutes to hear, convict and dispose of each appellant. (A. 1-32). Surely, the more measured pace of a jury trial is appropriate when children may be stigmatized with conviction for serious crimes and face institutionalization for years.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

DANIEL E. FARMER
JOHN S. ROBERTS, Jr.
PETER W. BROWN
HARVEY N. SCHMIDT
Attorneys for Appellants

JAMES O. FREEDMAN
Of Counsel

August, 1970

FILE COPY

Supreme Court, U.S.
FILED
SEP 24 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 322.

JOSEPH McKEIVER

and

EDWARD TERRY,

Appellants,

v.

PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of Pennsylvania.

Brief for Appellee

JAMES D. CRAWFORD,
Deputy District Attorney for Law,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney,
Counsel for Appellee.

Room 666, City Hall
Philadelphia, Pa. 19107

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

INDEX

PAGE

Statement of Questions Presented 2

Statement of the Case 2

Summary of Argument 4

Argument 5

I. Nothing in the Decisions of This Court Has So Equated Delinquency Proceedings With Criminal Trials As To Require the Automatic Application of the Sixth Amendment Right to Jury Trials to Juvenile Courts 5

A. Juvenile Proceedings Parallel, Rather than Mimic, Criminal Procedure 6

B. Duncan is a Purely Criminal Law Decision .. 9

II. Trial of Juvenile Cases Before Experienced Judges Provides a Fundamentally Fair Procedure in Keeping With the Fourteenth Amendment Prohibition Against Deprivation of Liberty Without Due Process of Law 10

A. Juvenile Proceedings Are Governed by Due Process Fairness Rather Than Direct "Selective Incorporation" 12

B. Fundamental Fairness Does Not Require Use of the Jury As a Fact Finder 16

C. Despite Duncan, State Appellate Courts Have Almost Uniformly Upheld the Legislative Judgment That Bench Trials Are Preferable in Juvenile Proceedings 23

D. The Most Careful Commentators Have Concluded That Trial by Jury Would Detract, Rather Than Add to the Fairness of Juvenile Proceedings 28

Conclusion 34

TABLE OF CITATIONS

FEDERAL CASES: PAGE

Baldwin v. New York, —— U. S. ——, 90 S. Ct. 1886 (1970) 17

DeStefano v. Woods, 392 U. S. 631 (1968) 16

Douglas v. Alabama, 380 U. S. 415 (1965) 7

Duncan v. Louisiana, 391 U. S. 145 (1968) ..5, 9, 10, 11, 12, 16, 17, 23, 27

In re Gault, 387 U. S. 1 (1967) 6, 7, 9, 10, 12, 13, 14, 15, 18, 20, 21, 22, 24, 29

In re Winship, 397 U. S. 358 (1970) 6, 7, 8, 10, 12, 13, 15, 16

Kent v. United States, 383 U. S. 542 (1966) 6, 7, 10, 13

Malloy v. Hogan, 378 U. S. 1 (1964) 6

Nieves v. United States, 280 F. Supp. 994 (S. D. N. Y. 1968) 21

Palko v. Connecticut, 302 U. S. 319 (1937) 11

Pointer v. Texas, 380 U. S. 400 (1965) 7

United States ex rel. Bennett v. Rundle, 419 F. 2d 599 (3d Cir. 1969) 8

United States v. Jackson, 390 U. S. 570 (1968) 22

Williams v. Florida, —— U. S. ——, 90 S. Ct. 1893 (1970) 17

OTHER CASES:

Bible v. State, —— Ind. ——, 254 N. E. 2d 319 (1970) 26

Commonwealth v. Johnson, 211 Pa. Superior Ct. 62, 234 A. 2d 9 (1967) 13, 18, 20, 22

DeBacker v. Brainard, 183 Neb. 461, 161 N. W. 2d 508 (1968), appeal dismissed, 396 U. S. 28 (1969) .. 27

PAGE

Dryden v. Commonwealth, 435 S. W. 2d 457 (Ky. 1968) 27

Estes v. Hopp, 73 Wash. 2d 272, 438 P. 2d 205 (1968) 21

Heard v. Rizzo, 281 F. Supp. 720 (E. D. Pa. 1968), aff'd 392 U. S. 646 22

Hopkins v. Youth Court of Issaquena County, 227 So. 2d 282 (Miss. 1969) 27

In re Agler, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969) 24

In re Burrus, 169 S. E. 2d 879 (N. C. 1969) 27

In re Fucini, 44 Ill. 2d 305, 255 N. E. 2d 380 (1970) .. 28

In re Geiger, 184 Neb. 581, 169 N. W. 2d 431 (1969) 27

In re Johnson, 255 A. 2d 419 (Md. 1969) 23

In re R. L., 3 Cal. App. 100, 83 Cal. Rptr. 81 (1970) 28

In re W, 309 N. Y. S. 2d 280 (Fam. Ct. Westchester Co., 1970) 15

McKeiver Appeal, 215 Pa. Superior Ct. 760, 255 A. 2d 921 (1969) 3

Peyton v. Nord, 78 N. M. 717, 437 P. 2d 716 (1968) .. 21

Shane v. Maine, —— Me. ——, 237 A. 2d 412 (1968) 22

State v. Turner, 88 Ore. Adv. Sh. 363, 453 P. 2d 910, 912 (1969) 22, 24, 28

Terry Appeal, 215 Pa. Superior Ct. 762, 255 A. 2d 922 (1969) 4

Terry Appeal, 438 Pa. 339, 265 A. 2d 350 (1970) ..2, 3, 13

CONSTITUTIONAL AND STATUTORY PROVISIONS:

Fifth, Sixth and Fourteenth Amendments, U. S. Const. 2, 5, 6, 8, 10, 11, 15

OTHER AUTHORITIES: PAGE

Arthur, Lindsay G., "Should Children Be As Equal As People," 44 N. D. L. Rev. 204 (1969) 33

Council of Judges of the National Council on Crime and Delinquency 1969, "Model Rules for Juvenile Courts" 31

District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 84 Stat. 473 (July 29, 1970) 18

Kalvin and Zeisel, The American Jury (1966) 16, 17

Note, A Due Process Dilemma, Juries for Juveniles, 45 N. D. L. Rev. 251 (1969) 18

Pennsylvania Juvenile Court Law, Act of June 2, 1933, P. L. 1433, Sec. 5, 11 P. S. Sec. 247 ...18, 22, 26

President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society" 29

President's Commission on Law Enforcement and Administration of Justice, Task Force Report, "Juvenile Delinquency and Other Crime" 29

Uniform Juvenile Court Act, National Conference of Commissioners on Uniform State Laws (1968) 30

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970.

No. 322.

JOSEPH McKEIVER

AND

EDWARD TERRY,

Appellants,

v.

PENNSYLVANIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR APPELLANTS

STATEMENT OF QUESTIONS PRESENTED.

I. Have the decisions of this Court so equated juvenile delinquency proceedings with criminal trials that the Sixth Amendment requirement of trial by jury *in all criminal prosecutions* prohibits the States from legislating a juvenile court procedure which does not provide for a jury as the finder of fact?

II. Apart from the applicability of criminal law standards to juvenile delinquency proceedings, is trial by jury so essential to fundamental fairness that the Fourteenth Amendment prohibition against deprivations of liberty *without due process of law* prohibits the States from legislating a juvenile court procedure which does not provide for juries as the finder of fact?

STATEMENT OF THE CASE.

This is an appeal from the order of the Supreme Court of Pennsylvania, *Terry Appeal*, 438 Pa. 339, 265 A. 2d 350 (1970), affirming two orders of the Superior Court of Pennsylvania which upheld the adjudications of delinquency which form the underlying basis of the present appeals. The procedural history of two cases is as follows:

A. JOSEPH McKEIVER.

This is an appeal from orders of the appellate courts of Pennsylvania affirming the order of the Honorable Theodore S. Gutowicz of the Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, adjudicating appellant delinquent on charges of robbery, larceny, and receiving stolen goods.

Joseph McKeiver's case came before the Juvenile Court n May 15, 1968, upon petition charging the minor with al-ged acts of delinquency including robbery, larceny, and eceiving stolen goods. The matter was continued to Oc-ber 17, 1968, because the child was without legal coun-el to represent him. At that time the case was referred to Community Legal Services.

On the date of the adjudicatory hearing, October 17, 968, counsel for appellant requested a jury trial. This equest was denied and the case heard by the Court.

Appellant was adjudicated a delinquent and placed on robation.

On November 7, 1968, counsel for appellant filed a peti-ion for rehearing, based only on the denial of the jury for trial. The hearing was held on December 20, 1968, and on February 13, 1969, the Court denied the petition stating "Petition for rehearing, based on the failure of the court to allow a jury trial, is denied."

After briefs and oral argument, the Superior Court af-firmed. *McKeiver Appeal*, 215 Pa. Superior Ct. 760, 255 A. 2d 921 (1969). The Supreme Court of Pennsylvania granted leave to appeal and, on December 30, 1969, con-solidated the case with the appeal of one Edward Terry which raised the same issue. Briefs were submitted, oral argument held, and on May 4, 1970, the orders of the Su-perior Court were affirmed. *Terry Appeal, supra.*

B. EDWARD TERRY.

This is an appeal from orders of the appellate courts of Pennsylvania affirming the order of the Honorable Jo-seph C. Bruno of the Court of Common Pleas, Family Di-vision, Juvenile Branch, of Philadelphia County, adjudi-cating appellant delinquent on charges of assault and battery and conspiracy.

This matter came before the Court on August 31, 1968, upon petition, charging the minor with alleged acts of de-

linquency including assault and battery on a police officer and conspiracy.

On March 27, 1969, the youngster, with counsel, appeared before the Court at which time a request was made for jury trial. The request was denied and the matter was heard by the Court sitting without jury. Edward Terry was adjudicated a delinquent and placed at the Youth Development Center at Cornwells Heights.

On May 6, 1969, appellant filed a petition for rehearing alleging the denial of a jury trial. Such petition was denied.

After briefs and oral argument, the Superior Court affirmed. *Terry Appeal*, 215 Pa. Superior Ct. 762, 255 A. 2d 922 (1969). As stated previously, the Supreme Court of Pennsylvania allowed an appeal, consolidated the case with the appeal of Joseph McKeiver, received briefs, heard argument, and affirmed.

This appeal followed.

SUMMARY OF ARGUMENT.

The whole basis of appellants' argument is that, since the right to trial by jury is applicable to the States in all criminal trials under the decisions of this Court, the same procedure must be guaranteed to youths in juvenile delinquency proceedings.

In so arguing, appellants have overlooked the basic holdings of this Court's decisions concerning both juvenile court procedures and the right to jury trial, and in so doing have misread the constitutional provisions which underlay this Court's decisions.

Thus, it is clear that this Court has as firmly refused to apply the label "criminal" to juvenile court proceedings as it has rejected the attempts of others to label them merely "civil." Rather, the Court has treated the field of juvenile court cases as sui generis.

On the other hand, this Court has carefully limited its decision in *Duncan v. Louisiana* to criminal cases, where trial by jury was inherent in the basic procedures of every jurisdiction, and has not said anything which would make the decision applicable to juvenile proceedings where bench trials are required in the vast majority of jurisdictions.

Moreover, it is clear that there is no fundamental unfairness in nonjury trials which makes the requirements of such trials in juvenile court proceedings a denial of due process of law. Not only did this Court recognize in *Duncan* itself that it would be perfectly possible to create a fair and equitable fact finding procedure without trial by jury, but the overwhelming majority of legislatures, courts and commentators have concluded that the juvenile courts are actually or potentially such a system.

Finally, if nonjury trials provide a fair fact finding system in juvenile courts, this Court should not force the States to abandon experimentation in the juvenile court field and force them to adopt throughout the criminal law model so long as the procedure adopted is equally effective in protecting the substantive rights of juveniles to a fair and accurate adjudication of all factual issues.

ARGUMENT.

I. NOTHING IN THE DECISIONS OF THIS COURT HAS SO EQUATED DELINQUENCY PROCEEDINGS WITH CRIMINAL TRIALS AS TO REQUIRE THE AUTOMATIC APPLICATION OF THE SIXTH AMENDMENT RIGHT TO JURY TRIALS TO JUVENILE COURTS.

With respect to state court criminal trials, this Court has in the past decade abandoned the more amorphous and flexible standards of "due process" to apply to the States

the specific requirements of the Bill of Rights through the Fourteenth Amendment. With the exception of grand jury indictment, public and local trial, and non-excessive bail, each of these guarantees has been directly applied to the conduct of state, as federal, criminal trials. Among those rights specifically held as applicable to state as to federal criminal prosecutions is the right to trial by jury. *Duncan v. Louisiana*, 391 U. S. 145 (1968).

A. Juvenile Proceedings Parallel, Rather than Mimic, Criminal Procedure.

At the same time that this Court has moved to apply the federal constitutional model to state criminal trials, it has decided a parallel series of cases bringing juvenile delinquency proceedings within the more general standards of due process of law. See *Kent v. United States*, 383 U. S. 542 (1966); *In re Gault*, 387 U. S. 1 (1967); *In re Winship*, 397 U. S. 358 (1970). Each of these cases has afforded juveniles greater protection against arbitrary action. Since *Kent*, no juvenile court can relinquish its jurisdiction without affording the juvenile a full hearing; since *Gault*, in the adjudication of delinquency the juvenile must have notice, the right to counsel, the privilege against compulsory self-incrimination, and the right to cross-examine witnesses; since *Winship*, finally, a determination of delinquency must be based on proof beyond a reasonable doubt.

In each of these cases, this Court has rejected the simplistic argument that due process standards do not apply to juvenile court proceedings because these proceedings are "civil" rather than "criminal." But, at the same time, the Court did not accept the equally simplistic device of merely equating juvenile court proceedings with criminal prosecutions. Thus, for example, when the Court decided *Gault*, the fifth amendment protection against compulsory self-incrimination, *Malloy v. Hogan*, 378 U. S. 1 (1964), and the sixth amendment right to confrontation and cross-exam-

ination of witnesses, *Pointer v. Texas*, 380 U. S. 400 (1965), and *Douglas v. Alabama*, 380 U. S. 415 (1965), had already been applied to state criminal trials. Yet the Court took fifteen pages to decide that these particular rights should also apply in juvenile proceedings. 387 U. S. at 42-57. Likewise, in *Winship* the Court first held that the reasonable doubt standard was a constitutional safeguard in criminal trials. This, however, did not resolve the issue; the Court then turned to the question "whether juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with violation of a criminal law." 397 U. S. at ——, 90 S. Ct. at 1073. Only after an extended discussion did the Court hold that it would be unfair to permit the incarceration of a juvenile on less proof than would be needed to imprison an adult.

These well reasoned and extended discussions by the Court reveal a reluctance to equate juvenile trials with criminal trials. Rather, the Court has preferred to examine each particular procedural right to determine its utility in juvenile proceedings. In fact, the Court has been quite explicit on this point:

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing. . . .

Kent v. United States, 383 U. S. at 562, reiterated in *Gault*, 387 U. S. at 30, and *Winship*, 397 U. S. at ——, 90 S. Ct. at 1070.

In refusing merely to equate juvenile proceedings with ordinary criminal trials, this Court has consistently recognized that, whatever the failing of the juvenile courts, there is still reason to preserve the peculiar virtues which the juvenile courts had in dealing with others who would, but for the juvenile court acts, find themselves on trial as adult criminals. Thus, most recently, this Court in *Winship* carefully qualified its decision (397 U. S. at ——, 90 S. Ct. at 1075) (emphasis added):

> Nor do we perceive any merit in the argument that to afford juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process. Use of reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. *Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place.* And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings which are employed prior to the adjudicatory hearing.

(Footnotes omitted.) In addition to trial by jury, the issue involved in this case, there are several other constitutional rights involved in the trial of adults which would appear to be inimical to juvenile court proceedings and, presumably, are not constitutionally required in such proceedings whether in state or federal courts. Thus, for example, no formal indictment by a grand jury is required in federal juvenile cases and clearly would be out of keeping with state juvenile proceedings even if this Court were to hold that this Fifth Amendment right is applicable to the states. Similarly, the Sixth Amendment right to a public trial, which may well be required in state criminal prosecutions, see *United States ex rel. Bennett v. Rundle*, 419 F. 2d 599 (3d Cir. 1969), would be totally out of keeping in juvenile proceedings where increased rather than decreased confidentiality and secrecy seems in order. See *In re Winship*, 397 U. S. at ——, 90 S. Ct. at 1074 and n. 5.

B. Duncan is a Purely Criminal Law Decision.

On the other hand, it is obvious that this Court was very specifically thinking of the criminal process in the traditional sense when it decided *Duncan v. Louisiana*, 391 U. S. 145 (1968). The holding in *Duncan* is stated most simply:

> It is sufficient for our purposes to hold that a *crime* punishable by two years in prison is . . . a serious crime . . . and appellant was entitled to a jury trial . . .

391 U. S. at 161-62 (emphasis added).

An analysis of the *Duncan* opinion makes it clear why it has not been held applicable to juvenile proceedings.

In *Duncan* at footnote 30, the Court stated:

> Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the Federal Courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. *It seems unlikely to us that our decision today will require widespread changes in state criminal processes.*

(Emphasis added.) It must, thus, be evident that this Court in *Duncan* wished to limit its holding as narrowly as possible.

The Commonwealth does not quarrel with appellants' arguments spelling out the historical background of the right to trial by jury in *criminal cases*. However, *Gault* never intended that all of the procedures inherent in criminal cases were to be made applicable to juvenile cases. The basic thrust of *Gault* was to mandate "fairness" in juvenile proceedings.

Most states do not provide for jury trials in juvenile cases and to make such a requirement at this stage of the changing development of juvenile court law would create

a disruptive effect in the basic concept of the treatment of juveniles that would ultimately defeat the very purpose of distinguishing between juveniles and adults.

In this respect, the basic thrust of *Duncan* can best be understood when observing the following statement made at footnote 14 of that decision:

> A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. *Yet, no American State has undertaken to construct such a system.* Instead, every American State, including Louisiana, uses the jury extensively, and imposes *very serious punishments* only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process—*the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.* (Emphasis added.)

Thus, *Duncan* distinguishes between systems whose fabric is entwined with jury trial guarantees and those whose fabric is not. The American criminal trial system is an excellent example of the first category; the juvenile court system is equally an example of the second.

II. TRIAL OF JUVENILE CASES BEFORE EXPERIENCED JUDGES PROVIDES A FUNDAMENTALLY FAIR PROCEDURE IN KEEPING WITH THE FOURTEENTH AMENDMENT PROHIBITION AGAINST DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW.

As this Court's decisions in *Kent, Gault* and *Winship* make clear, a mere refusal to equate juvenile court proceedings with criminal prosecutions does not mean that

youths charged with juvenile delinquency are not guaranteed substantial constitutional protection. Rather, as each of this Court's decisions in the area has made clear, the due process clause of the Fourteenth Amendment requires that juvenile court procedures must grant a youth a trial which, if it does not follow all of the forms of the criminal process, nevertheless is as fair and as accurate in its determinations as the criminal process.

To put the matter in different terms, in dealing with criminal cases, this Court has adopted the selective incorporation theory to determine which of the Bill of Rights apply to the states through the Fourteenth Amendment. In so doing, the Court has rejected the total incorporation theory advocated by Mr. Justice Black and the fundamental fairness theory advocated by Mr. Justice Harlan.[1] The latest formulation of the selective incorporation theory was stated in *Duncan v. Louisiana*, 391 U. S. 145, 149 n. 14 (1968) (emphasis added):

> . . . state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developed contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is *fundamental—whether that is, a procedure is necessary to an Anglo-American regime of ordered liberty.*

This clearly is not the fundamental fairness test, for if it were Mr. Justice Harlan would have had no quarrel with it. Rather, even when fairness is possible without a particular procedure, the procedure is nevertheless required in state criminal trials if it is necessary to the American regime of ordered liberty. Thus, trial by jury is "not necessarily fundamental to fairness", *Duncan v. Louisiana*, 391

---

[1] These three theories, which have divided the Court since **Palko v. Connecticut**, 302 U. S. 319 (1937), are expounded again in the various opinions of **Duncan v. Louisiana**, 391 U. S. 145 (1968).

U. S. at 149, n. 14, but because trial by jury was long ago established to protect against governmental oppression, it is necessary to the American scheme of ordered liberty. 391 U. S. at 155-56.

A. Juvenile Proceedings Are Governed by Due Process Fairness Rather Than Direct "Selective Incorporation."

This formulation of the selective incorporation theory clearly is not used by this Court in juvenile delinquency cases. First, if the two theories were identical, all constitutional procedures applicable in criminal trials would likewise be applicable in juvenile proceedings without further analysis. As appellee has already shown, this is not the case. Second, the Court has been explicit in formulating a test more akin to, if not identical with, Justice Harlan's fundamental fairness test. In *Gault,* 387 U. S. at 19-21, the Court said:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.

In *Winship,* 397 U. S. at ——, 90 S. Ct. at 1070, the Court added:

> Gault decided that, although the Fourteenth amendment does not require that the hearing at this stage conform with all the requirements of a criminal trial or even of the usual administrative hearing, the Due Process Clause does require application during the ad-

> judicatory hearing of "the essentials of due process and fair treatment". . . . This case presents the single, narrow question whether proof beyond a reasonable doubt is among the *"essentials of due process and fair treatment"*.

(Emphasis added.) Again in *Winship*, the Court reiterated the words of the dissenting judges from the New York Court of Appeals. 397 U. S. at ——, 90 S. Ct. at 1072:

> A person accused of crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case. 24 N. Y. 2d, at 205, 247 N. E. 2d at 259.

Both appellate courts in Pennsylvania have interpreted this Court's opinions as only requiring fundamental fairness in juvenile proceedings. In *Commonwealth v. Johnson*, 211 Pa. Superior Ct. 62, 73-74, 234 A. 2d 9, 14-15 (1967), the Court in analyzing *Kent* and *Gault* said:

> The constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment, and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases.

The Pennsylvania Supreme Court, in denying appellant's appeal, noted that a fair system of juvenile justice could exist without jury trial. *Terry Appeal*, 438 Pa. 339, 350, 265 A. 2d 350, 355 (1970).

Defining the applicable test as one of fundamental fairness is not to solve the problem, however. The test must be more specific and concrete. Analysis of *Gault* and *Winship* indicates that this Court has required those procedures likely to induce accuracy in the fact-finding process and likely to reduce, to some extent, the evils and shortcomings of the juvenile justice system. In *Gault*, for example, a

fifteen-year-old boy was taken into custody after a neighbor complained about a lewd and indecent phone call. The deputy probation officer filed a petition the next day with the juvenile court alleging the boy's delinquency. The petition contained no factual allegations; in any event, it was not presented to Gault or his parents. That same day a hearing was held. The complainant did not attend; no one was sworn; no transcript or recording was made; Gault was not represented by counsel. Gault testified, but those in attendance could not later agree whether he admitted making obscene statements. The Court's reaction is not surprising: "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U. S. at 18. Likewise, not surprising is the Court's reference to "instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact." 387 U. S. at 19-20. Certainly Gault's hearing, so conducive to inaccurate fact-finding, was fundamentally unfair.

To insure fundamental fairness—that is, to insure accurate fact-finding procedures—Gault held that due process requires notice "sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded" and sufficiently particular in its factual allegations. 387 U. S. at 33. Second, due process requires "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he [the child] has a defense and to prepare and submit it." 387 U. S. at 36. Third, *Gault* held that due process requires an opportunity

for confrontation and cross-examination. 387 U. S. at 56. Such an opportunity is essential to accurate fact-finding.[2]

Winship, likewise, was concerned with accurate fact-finding. The standard of proof beyond a reasonable doubt, said the Court, was developed to "safeguard men from dubious and unjust convictions" resting on "factual error", 397 U. S. at ——, 90 S. Ct. at 1072.

The philosophical and jurisprudential principles involved here are set forth succinctly in *In re W*, 309 N. Y. S. 2d 280, 282 (Fam. Ct. Westchester Co., 1970):

> The recent Appellate Court and United States Supreme Court decisions involving rights of juveniles have been primarily concerned with the safeguarding of the rights of the juveniles and in affording to the juvenile such constitutional rights as would guarantee to him the benefit of counsel, protection against compulsory self-incrimination, confrontation of witnesses and notice of the issues involved (In re Gault, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527). These decisions relate to the juvenile's rights with respect to the manner in which the Petitioner presents his affirmative case and the manner in which the youth defends against the allegations rather than whether the trial shall be before a judge only or a judge and jury. It is clear that the rights and interests of juveniles must be protected to avoid a finding that he committed an act which he in fact did not commit—in effect to protect

---

[2] The exclusion of compulsory testimony by the accused is based only in part on a disbelief that such coerced testimony from an accused is likely to be accurate. More fundamentally, the Fifth Amendment prohibition against compulsory self-incrimination or coerced testimony by an accused is and has always been applicable to non-criminal proceedings, and a witness could not have been forced to incriminate himself merely on the grounds that he was testifying in a civil action or, in fact, was not testifying at all but merely under questioning or investigation. Thus, Gault did not announce a new policy, it merely reminded the courts that a juvenile accused had the same right to silence during a juvenile proceeding that existed through every other moment in his life.

the innocent juvenile against a finding of fault where none existed. Trial by jury is not related to the rights and protection which have been afforded juveniles under recent decisions.

B. Fundamental Fairness Does Not Require Use of the Jury As a Fact Finder.

If it is clear that the decision to require any given procedure in juvenile adjudications turns on whether or not that procedure is essential to the fair conduct and determination of the factual issues before the juvenile court, it is equally clear that trial by jury, while traditional in both criminal cases and civil cases at law, is not necessary to the fair finding of facts. Thus, for example, the majority of jurisdictions have no guarantee of trial by jury in equity matters, in workman's compensation cases or in wills and estates matters. The federal government provides no trial by jury in such vital quasi-criminal areas as deportation cases and courts-martial. Similarly, this Court itself recognized that "a criminal process which was fair and equitable but used no juries is easy to imagine," *Duncan*, 391 U. S. at 149, n. 14, and refused to apply *Duncan* retroactively in large part because there was no reason to believe that any particular trial without a jury was unfair, *DeStefano v. Woods*, 392 U. S. 631, 633-34 (1968).[3] Nor has

---

[3] Appellant relies upon the study done by Kalven and Zeisel, The American Jury, pp. 189-90 (1966), which concludes, among other things:

> If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system.

This is a formidable statement in light of **Winship**, which held that proof beyond a reasonable doubt is necessary in juvenile proceedings. For this reason, it is in order to raise some questions about the study which produced this conclusion. First, the authors, in studying the extent of disagreement in criminal verdicts reached by judges and juries, relied on a method that required the judge to locate the sources of disagreement. American Jury, at 94. The jurors were never asked

anything in this Court's subsequent decisions in *Baldwin v. New York*, —— U. S. ——, 90 S. Ct. 1886 (1970), and *Williams v. Florida*, —— U. S. ——, 90 S. Ct. 1893 (1970), reiterating the applicability of the jury trial guarantee to serious criminal cases modified any of the principles set forth in *Duncan*.

And if no system dispensing with trial by jury has been attempted in the United States with respect to criminal trials, it is equally clear that the vast majority of states have constructed such systems in the juvenile realm. As of 1969, twenty-seven American jurisdictions denied the right to trial by jury in juvenile cases whereas only twelve re-

---

to explain their verdicts; rather, the judges were asked to explain why the jurors voted as they did. Second, the authors found that the judge and jury disagreed on the verdict only about 25% of the time, and in only 16% of the cases was the jury more lenient. American Jury, at 59. The authors, moreover, limited even the significance of this finding **(ibid.)**:

> But this figure must not be made the basis for a general probability calculus by **any** defendant, because the cases to which this 16 per cent applies have been selected for jury trial **because** they are expected to evoke pro-defendant sentiments.

Moreover, on the basis of the responses from the judges, the authors concluded that the jurors only disagreed one-third of the time because they saw the facts differently; "in the remaining two-thirds of the cases the sources of disagreement are to be seen fully only by looking beyond the official role of the jury." American Jury, at 116. This includes factors such as the jury was unsympathetic with the law, the jury had certain sentiments about the defendant, the jury did not have facts the judge had, and the jury was influenced by the disparity of counsel. In none of this is there any mention of jurors and judges disagreeing because of different feelings about the standard of proof. But Kalven and Zeisel were convinced such a reason should exist; therefore, they posited that some differences occurring on factual grounds must exist for this reason. How did they prove this?

> If it [the difference over this standard] is operative there should be some cases of disagreement which cannot be explained in any other terms.

American Jury, at 185.

Hence, it is seen that judges were asked to explain why jurors voted as they did, and only by a process of elimination did the authors find a difference as to the standard of proof. This is hardly a basis for making constitutional decisions concerning the place of trial by jury in factual determinations.

quired it.[4] And, since that time, Congress has removed the District of Columbia from the minority and added it to the majority with the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, P. L. 91-358, 84 Stat. 473 (July 29, 1970). This Act replaced Section 16-2307 of the D. C. Code, which provided for trial by jury in juvenile cases with a new Section 16-2316, which specifically requires trial by the court alone. Typically, the Pennsylvania Juvenile Court Law, Act of June 2, 1933, P. L. 1433, Sec. 5, 11 P. S. Sec. 247 provides: "except as hereinafter provided, the court shall hear and determine all cases affecting children arising under the provisions of this act without a jury." The judgment of twenty-eight legislative bodies, including the Congress of the United States, that fairness in juvenile proceedings does not require trial by jury deserves the respect of this Court.

Nor has a single appellate court anywhere in the United States held that the federal constitution requires the granting of jury trials at juvenile delinquency hearings under a statutory scheme in any way resembling that set forth by the Pennsylvania Juvenile Court Act.

For example, the question which appellant seeks to raise in this case was first faced and decided by the Superior Court of Pennsylvania in the light of *In re Gault*, 387 U. S. 1 (1967), in *Commonwealth v. Johnson*, 211 Pa. Superior Ct. 62, 234 A. 2d 9 (1967). In an opinion by the Honorable J. Sidney Hoffman, long a judge of the Philadelphia Juvenile Court, the Court held that the *Gault* opinion required only that the basic fairness of due process and not the specific attributes of an adult criminal trial (including trial by jury) be applied to juvenile proceedings.

Among Judge Hoffman's most significant observations were the following (211 Pa. Superior Ct. at 73-75, 211 A. 2d at 15-16):

---

[4] The statutes are cited in Note, A Due Process Dilemma, Juries for Juveniles, 45 N. D. L. Rev. 251, 258, nn. 48-49 (1969).

The Court further hastens to point out that no inference should be drawn from its opinion that juveniles must be treated exactly as are adults in criminal proceedings. Quoting from its earlier opinion in *Kent v. United States*, 383 U. S. 541, 562 (1966), it stated: "'We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure **up to the essentials of due process and fair treatment.**' We reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution" (pp. 30-31).

Significantly, the Supreme Court in *Kent*, in making the above statement, was apparently relying on the following statement in *Pee v. U. S.*, supra, p. 599: "The constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment, and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases. So far as we can ascertain, with few exceptions in a multitude of cases, this has been the ruling of the Courts. By the same token the Federal Rules of Criminal Procedure do not apply to these proceedings."

Nor does the Supreme Court suggest that the adversary system is now required in juvenile court, but only that Due Process requirements ". . . in contested cases will introduce *some* elements of the adversary system". (Emphasis ours.) (p. 27). Finally the Court does not hold that a juvenile court may not act in a parental manner, but only that this authority must be curbed: "In Kent v. United States, supra, we stated that the Juvenile Court Judge's exercise of the power of the State as *parens patriae was not unlimited*. We said that 'The admonition to function in a "parental" relation-

ship is not an invitation to procedural arbitrariness' ". (Emphasis added.) (p. 30).

In short, those who find in *Gault* the obliteration of any distinctions between the treatment accorded juveniles and adults are reaching a conclusion that is unwarranted. It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend whereby "the child receives the worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." (*Kent v. U. S.*, supra, p. 556.) It has not suggested that we discard the flexibility which has long been the hallmark of juvenile courts, but that we temper it with certain procedural safeguards.

The Supreme Court's opinion should not be viewed by the Courts or Judges of this Commonwealth as a mandate to abandon the juvenile court adjucative procedure. Rather, it is an invitation to formulate a court procedure which will combine the best aspects of juvenile and criminal court procedure into an amalgam which will offer the juvenile the best of both worlds. The Supreme Court, in our view, recognized that there are essential differences between the trial of adults and juveniles. Similarly, juvenile court judges must recognize these differences and exercise their discretionary powers, if the aims or purposes of the juvenile court are to be achieved.

Judge Hoffman showed most poignantly that if jury trials are inserted into juvenile court proceedings, "the juvenile court judge will be sorely limited in carrying out the special tasks which the legislature has assigned to him." (211 Pa. Superior Ct. at 77, 211 A. 2d at 17.) He also made note of the fact that the National Crime Commission Report, to which the Supreme Court frequently referred in *Gault*, contains the following significant statement (*Ibid.*):

> Most States do not provide jury trial for juveniles. Even Illinois, New York and California, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. *As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.*

The court's opinion concluded that the institution of jury trial in juvenile court, while not materially contributing to the fact-finding function of the court, would seriously limit the court's ability to function in its unique manner, and would result in a sterile procedure which could not vary to meet the needs of delinquent children.

In reaching this conclusion, the Pennsylvania court blazed a trail that was quickly followed by the Supreme Court of Washington in *Estes v. Hopp*, 73 Wash. 2d 272, 438 P. 2d 205 (1968). In fact, of some fourteen jurisdictions in which appellate courts faced the question of the requirement of jury trial in juvenile cases, only the Supreme Court of New Mexico in *Peyton v. Nord*, 78 N. M. 717, 437 P. 2d 716 (1968), has held that jury trials were required, and the basis of the New Mexico decision was not the federal Constitution but provisions of the New Mexico Constitution and statutes totally inapplicable to this case.[5]

---

[5] The only two federal cases which have even peripherally adverted to the right to jury trial in the light of **Gault** are of no help in solving the question. In **Nieves v. United States**, 280 F. Supp. 994 (S. D. N. Y. 1968), the court decided that such a right existed under the federal Juvenile Delinquency Act because that Act did not provide that juveniles were automatically free from criminal prosecution but, instead, normally gave the juvenile the choice between prosecution as an adult and adjudication as a juvenile. The result of the peculiar federal scheme, accordingly, was, the court held, to force the juvenile defendant to waive his right to jury trial in order to

Underlying the decision in *Johnson* and its numerous approving progeny discussed in the succeeding section of this brief is the recognition that trial by an expert juvenile court judge is central to the remedial philosophy of the juvenile court act in Pennsylvania as in the vast majority of American jurisdictions. Accordingly, to require trial by jury in delinquency proceedings would transform the whole legislative intention and undermine the entire juvenile court act. As the Supreme Court of Oregon said concerning its similar act in *State v. Turner,* 88 Ore. Adv. Sh. 363, 453 P. 2d 910, 912 (1969):

> It would be simple, by striking down the juvenile code, to return the accused child to the criminal courts and thereby afford him the full range of constitutional due process which accompanies a criminal trial. The juvenile then would be entitled to indictment, bail, and all the other rights of an adult. But the *Gault* case recognized that, despite its faults when loosely administered, the *parens patriae* concept has some residual validity, and expressly refrained from a "root and branch" extirpation of the separate juvenile system.

See also *Shane v. Maine,* —— Me. ——, 237 A. 2d 412 (1968).

Finally, supporting the holding of the court in *Johnson* is the fact that the delays which would be caused by the introduction of the right to trial by jury into juvenile hearings make it clear that jury trial is incompatible with the juvenile court system. A simple judicial observation of the adult criminal courts and civil courts must make it clear to this Court that the right to demand a jury trial is the

---

obtain other benefits. This scheme is, of course, unconstitutional. Compare **United States v. Jackson,** 390 U. S. 570 (1968). On the other hand, the court in **Heard v. Rizzo,** 281 F. Supp. 720 (E. D. Pa.), aff'd, 392 U. S. 646 (1968), approved the Superior Court's decision in **Johnson** in general terms not specifically related to the jury trial question, but recognizing the effective work of the Pennsylvania appellate and trial courts to develop an effective compliance with **Gault.** The court in **Heard,** moreover, found in the **Gault** opinion an approval of the beneficial and humane schemes of juvenile processes as illustrated in the Pennsylvania Juvenile Court Act.

right to delay any trial whatever. Where an adult chooses to do so, the damage to the state may be great, but the damage to the defendant, at least, is normally limited to the delay of his trial. In juvenile cases, by contrast, the damage of delay to the State is identical, but the cost of the delay to the juvenile, is far more extreme, for the whole purpose of the juvenile court act is to mold the developing personality of a swiftly-changing youth so that he may grow up a member of society rather than its enemy. The very fluid nature of the youthful character makes any delay a potential disaster. Under these circumstances, it is enough for the state to provide a fair means of determining delinquency and choosing the promptness of such means available, so that the delinquent can be treated, where possible, before it is too late.

C. Despite Duncan, State Appellate Courts Have Almost Uniformly Upheld the Legislative Judgment That Bench Trials Are Preferable in Juvenile Proceedings.

Nor has the decision in *Duncan v. Louisiana,* supra, relied upon so heavily by appellants, persuaded the state courts that juvenile proceedings, in contrast to criminal trials, must include trial by jury. Finding *Duncan* inapplicable to juvenile proceedings, not one, but eleven, state appellate courts, including the court below, have decided unequivocally since *Duncan* that the Constitution does not give juveniles the right to a trial by jury. By contrast, not a single State has adopted the argument here urged upon this Court.

One of the most comprehensive opinions discussing the question is found in *In re Johnson,* 255 A. 2d 419 (Md. 1969), wherein the Court of Appeals of Maryland discussed the entire question of the applicability of jury trials to juvenile cases. Although counsel for appellant relied upon *Duncan,* see 255 A. 2d at 421, the Court refused to apply the *Duncan* rationale to juvenile cases, noting that the *Gault* decision did not hold that all the criminal procedures labelled "due process rights" need be applied to juveniles. Rather, the Court held, a juvenile is guaranteed only those

rights required in criminal trials whose existence was necessary to provide for a fair hearing in juvenile courts. Moreover, the Court equated juvenile hearings with trials in equity wherein a jury has never been the finder of fact. Based on this reasoning and a study of the earlier decisions, the Court concluded unanimously that jury trial was not required in juvenile cases.

Similarly, the Supreme Court of Ohio in *In re Agler*, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969), refused to require jury trial in juvenile cases, again looking to equity jurisdiction as the touchstone by which the fairness of trials without juries should be judged. The Court held (249 N. E. 2d at 814):

> Furthermore, we can perceive no benefit worthy of destroying a juvenile's traditional entitlement to special status which might accrue to an alleged delinquent from a jury trial. Unquestionably, fair adjudication can be had for a child represented by counsel, from a judge applying proper rules of evidence and a proper standard of proof. There exists a right of appeal to remedy error and reviewing courts may exercise vigilance over arbitrary determinations of delinquency.

Moreover, the Court declined to require indictment in delinquency proceedings, appropriately declining "to label delinquency a capital or otherwise infamous crime" which would require indictment or jury trial. Just as the Court in *Gault* had criticized labeling delinquency proceedings "civil" and thereby avoiding all need to provide constitutional protections, the Court in *Agler* noted that no purpose was served by simply treating juvenile proceedings as "criminal." In fact, the whole purpose of the juvenile proceeding was to avoid many of the attributes of criminal trial.

Yet again, the Supreme Court of Oregon in *State v. Turner*, 88 Ore. Adv. Sh. 363, 453 P. 2d 910 (1969), refused to apply *Duncan* to juvenile cases (453 P. 2d at 913-14):

> Regardless of the veneration in which Anglo-American law rightly holds the jury as an instrument of

criminal justice, it must be remembered that crime and punishment are not the primary business of the juvenile court. There is reason to question whether a jury trial is the most trustworthy instrumentality for protecting the rights of the child, his parents, and the state in a proceeding intended to salvage a child, if he is in need of governmental control.

One of the principal reasons for retaining trial by jury in the administration of criminal justice has been the desire of American society to mitigate the letter of the criminal law. When the question is "guilt" or "innocence," the people feel more secure in their confrontations with the government when a jury is present. The jury brings to its work in a criminal case a combination of sentiment and common sense. Frequently, the jury views the state with healthy skepticism, and tempers justice with subjective values for which no provision had been made in any statute. As Mr. Justice Holmes observed in Horning v. District of Columbia, 254 U. S. 135, 138, 41 S. Ct. 53, 54, 65 L. Ed. 185 (1920), "* * * the jury has the power to bring in a verdict in the teeth of both law and facts." The ad hoc legislative contribution of the jury system to the criminal law might enhance an occasional case involving the wardship of a child. But it is not certain that broad generalizations equating adult and juvenile cases are justified. If the fact-finding process before the judge is conducted in a fair and trustworthy manner without a jury, it is arguable whether the clash and clamor of a jury trial would enhance the rehabilitation of a child. See e.g., discussion in Dryden v. Commonwealth, supra, and In re Estes, supra.

We recognize the distinction between the adjudicative phase of a juvenile case and the dispositional phase. We are also aware that it is possible to utilize the jury in the first phase and to exclude it from the second. There is reason to believe, however, that, at least in cases of first offenders and of other children

who have not yet embarked upon a criminal career, the adjudicative phase of their court experience presents an important rehabilitative opportunity. See Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum. L. Rev. 281, 283, 289, 321, 325 (1967) (internal evidence indicates, however, that this article was written before the Court published its decision in *Gault*).

The imponderable question, of course, is whether there is any substantial danger that a child brought before a court without a jury would be found "in need of wardship" when in fact he had not committed the act charged. The concomitant question is whether the presence of the jury in the case would contribute a sufficiently substantial reduction in the margin of error to outweigh the possible harm to the child from participation in the drama of a criminal trial.

During the evolution of separate courts for juveniles the nation's legislative bodies considered all the arguments for and against jury trials in such cases. The possible danger of "convicting the innocent" undoubtedly weighed heavily in legislative deliberations. Unfortunately, however, no objective data have been found to answer the question whether such a danger exists. A dozen of the states and the District of Columbia have elected to provide jury trials for children. See Note, A Due Process Dilemma—Juries for Juveniles, 45 N. Dak. L. Rev. 251, 258 (1969). The majority of the states have decided that jury trials in juvenile cases would do more harm than good. While virtually all these legislative decisions antedated *Gault*, the legislators must have believed that the danger of a miscarriage of justice in the absence of a jury was remote.

This same analysis is clearly equally applicable to the Pennsylvania Juvenile Court Act.

Similarly, the Supreme Court of Indiana in *Bible v. State*, —— Ind. ——, 254 N. E. 2d 319, 324 (1970), gave its reasons for choosing to uphold the trial of juvenile cases to the court alone:

> The child will feel that he is being dealt with fairly, firmly and compassionately by the state. The less complex the procedure and the less formal the relationship between judge and juvenile, the more likely the child will understand the proceedings before him and the disposition thereof. This factor more than any other is essential if he is to develop a respect for the law. Thrusting a child into a criminal trial-like procedure with all of the strangeness of motions, objections, presumptions and burdens, etc., most of which only his attorney would comprehend, would provide little therapeutic value to the child and likely would be psychologically harmful.

A like result was reached by the Supreme Court of Nebraska in *DeBacker v. Brainard*, 183 Neb. 461, 161 N. W. 2d 508 (1968), appeal dismissed, 396 U. S. 28 (1969), and this holding was reaffirmed in *In re Geiger*, 184 Neb. 581, 169 N. W. 2d 431 (1969). While the Supreme Court of Nebraska is the only appellate court a majority of whose members have voted to require jury trials in juvenile cases since the *Duncan* decision, even in Nebraska jury trials are not required since five justices must concur in a finding of unconstitutionality under Nebraska law. Thus, even in Nebraska, *Duncan*, upon which the dissenting justices based their opinion, has not been held to require jury trials for juveniles.

The highest courts in both North Carolina and Mississippi have also specifically considered the *Duncan* decision and held that the federal Constitution does not require a jury trial in juvenile cases despite *Duncan*. *In re Burrus*, 169 S. E. 2d 879 (N. C. 1969); *Hopkins v. Youth Court of Issaquena County*, 227 So. 2d 282 (Miss. 1969). And the Court of Appeals of Kentucky, the highest court in that state, similarly rejected the right to jury trial in juvenile cases in a post-*Duncan* decision. *Dryden v. Commonwealth*, 435 S. W. 2d 457 (Ky. 1968). Its reasoning was that (435 S. W. 2d 457, 460-61):

> A jury trial, with all the clash and clamor of the adversary system that necessarily goes with it, would certainly invest a juvenile proceeding with the appearance of a criminal trial, and create in the mind and memory of the child the same effect as if it were. In our opinion there is more to be lost than gained. Certainly we cannot regard a jury as a better, fairer, more accurate fact-finder than a competent and conscientious circuit judge. There may be some judges who do not fit this description, but neither do all juries.

This same conclusion has since been adopted by appellate courts in two more of the most populous states. See *In re Fucini*, 44 Ill. 2d 305, 255 N. E. 2d 380 (1970); *In re R. L.*, 3 Cal. App. 100, 83 Cal. Rptr, 81 (1970).

D. The Most Careful Commentators Have Concluded That Trial by Jury Would Detract, Rather Than Add to the Fairness of Juvenile Proceedings.

Moreover, assuming that commentators as well as judges and legislators should be consulted in determining what constitutes fundamental fairness in the adjudication of delinquency, it is noteworthy that the outstanding students of the juvenile court system have declined to urge jury trial in delinquency cases. Thus, in refusing to hold that the Constitution requires jury trials in delinquency proceedings, the Supreme Court of Oregon in *State v. Turner*, 88 Ore. Adv. Sh. 363, 453 P. 2d 910, 913 (1969), held:

> Adverting again to the fundamental fact that we are dealing with children and not with adults, the ultimate question in a juvenile proceeding is not one of "guilt" or "innocence," but rather one of determining what is in the best interest of the child.
>
> Many thoughtful students of behavior and rehabilitation believe there are valid policy reasons for holding that due process, when applied to children, does not necesarily include the right to have a jury pass upon

the question of fact which must lie at the threshold of juvenile wardship.

Among the authorities relied on by that Court were the President's Commission on Law Enforcement and Administration of Justice's Report on "The Challenge of Crime in a Free Society," cited with approval by the Court in *In re Gault*, 387 U. S. 1, 38 (1967). It is of particular importance to note that in the recommendations set forth by the National Crime Commission Report the right to a jury trial in juvenile court is conspicuously absent. On the other hand, the recommendations of the Commission and the holding of *Gault* are carefully complied with by the Pennsylvania Juvenile Court Act.

Moreover, in the Task Force Report: "Juvenile Delinquency and Youth Crime", p. 38, The President's Commission on Law Enforcement and Administration of Justice enlarged upon the report set forth in "The Challenge of Crime in a Free Society", and stated as to jury trials:

> Most States do not provide jury trial for juveniles. Even Illinois, New York, and Carifornia, which have recently revised their juvenile court laws to increase procedural safeguards for the child, have not extended the right to trial by jury. There is much to support the implicit judgment by these States that trial by jury is not crucial to a system of juvenile justice. As this report has suggested, the standard should be what elements of procedural protection are essential for achieving justice for the child without unduly impairing the juvenile court's distinctive values.
>
> As has been observed, "A jury trial would inevitably bring a good deal more formality to the juvenile court without giving the youngster a demonstrably better fact-finding process than trial before a judge." The presence of a jury tends in a number of ways to contribute to an atmosphere of formality. In part, formality becomes itself an end insofar as it helps instill in jurors a sense of the seriousness and solemnity of their

duties. Moreover, the presence of a jury affects the whole process of dealing with evidence. Much of the reason for many restrictive rules of evidence, which typically give rise to narrow contentiousness over marginal issues, stems from the felt need to protect against a jury's susceptibility to prejudice and irrelevancies and its limited ability to distinguish between the more and less probative. And when a jury is the object of an attorney's persuasion, he naturally responds to what he believes will most affect it, with the usual result an emphasis on staging, effect, and emotion rather than a more businesslike presentation.

A further consideration arguing against a jury arises out of the typically loose and general statutory formulations of the behavior that may subject a youth to juvenile court jurisdiction, particularly insofar as the conduct includes acts other than those that would be criminal if engaged in by adults: *i.e.*, incorrigibility, need for care and supervision, truancy. Inequality and disparate decisions are invited by giving these formulae to *ad hoc* juries for application rather than to judges, who tend inevitably to develop concrete meanings for such terms. If a jury were required, the appropriate standard of proof (beyond a reasonable doubt, preponderance of the evidence, and so forth) would become a more critical issue.

As Mr. Justice Cardozo noted, it would not appear that a fair and enlightened system of justice is impossible without jury trials. "This too might be lost, and justice still be done."

Other autoritative persons who have deeply studied this question have arrived at the same conclusion. In the latest draft of the "Uniform Juvenile Court Act," drafted by the National Conference of Commissioners on Uniform State Laws and by it approved and recommended for enactment in all the states at its Annual Conference, July 22—August 1, 1968, which was approved by the American Bar Associa-

tion at its meeting at Philadelphia, Pennsylvania, August 7, 1968, provides in this regard, Section 24, page 20:

> (a) Hearings under this Act shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 3.

A distinguished group of judges throughout the nation intimately conversant with the problems of crime and delinquency has recently gone on record as favoring adjudicatory hearings without a jury in juvenile courts. In "Model Rules for Juvenile Courts" adopted by the Council of Judges of the National Council on Crime and Delinquency 1969, while not specifically so stating, it is clear from the rules that no jury is contemplated. Rule 23, page 49, and Rule 24, page 51, together with the comment on Rule 24, are as follows:

> Rule 23. Order of Proceedings.
>
> The court shall begin the hearing by determining whether all parties are present and whether lawful notice of the hearing has been given, and it shall require that these facts be of record. It shall then inform the parties of the substance of the petition.
>
> Before taking testimony, the court shall explain to the child and his parents their rights as set forth in Rules 38 and 39 and shall assign counsel if required by Rule 39.
>
> When the court has explained to the child the meaning of the right to remain silent and finds that he adequately understands this right, it may inquire of the child in a case brought under [section of the juvenile court law dealing with jurisdiction because of the child's violation of law or of a required standard of behavior] whether he admits or denies all or some of the allegations in the petition. Failure or refusal of the child to admit the allegations shall be deemed a denial of them.

If any or all of the allegations of the petition admitted by the child are sufficient to give the court jurisdiction, the court may take testimony to corroborate the admission or may proceed directly to the adjudication.

Rule 24. Preparation and Presentation of Evidence.

If the allegations of the petition are in issue, whether the testimony shall be elicited by the court or by a civil legal officer of the state or a subdivision thereof shall be determined by the court: The court shall base its determination on the complexities inherent in the case.

Comment.

In most cases, testimony should be elicited by the judge, who can insure the legality of the proceeding while maintaining the informal atmosphere that has traditionally permeated the juvenile court. On occasions, which the court anticipates complex questions of introduction of evidence, it may find it advantageous for the state's case to be elicited by an attorney, who can present the proof in appropriate order and control the testimony that will be given.

The prosecutorial atmosphere of criminal trials should have no place in juvenile courts. The purpose of the hearing is the elicitation of facts, avoiding the urge to obtain convictions prevalent in criminal courts. Prosecutorial techniques should therefore be avoided; if it is necessary for the facts to be elicited by an attorney, he should not be a member of the prosecutor's office.

The eliciting of testimony by a probation officer, untutored in the law, is not conducive to an orderly hearing and tends to undermine the child's faith in the impartiality of the probation staff, which may be called upon after disposition to work with the child. If the probation officer is in possession of facts related to the acts alleged in the petition, his role at the adjudicatory stage is only that of a witness.

Some members of the Council of Judges and the National Council of Juvenile Court Judges maintain that in any contested juvenile case, the testimony cannot be successfully elicited by the court and that it should be elicited by a civil legal officer. They hold that the same objections to presentation of the case by the probation officer apply to its presentation by the court and that, in addition, a judge cannot listen to the testimony and observe the reactions of the parties while he frames questions to be posed to a witness.

Similarly, the Honorable Lindsay G. Arthur, Vice President of the National Juvenile Court Judges Association, in an article entitled "Should Children Be As Equal As People?" 44 N. D. L. Rev. 204, 215 (1969), discussed the unwisdom of permitting jury trials in juvenile court matters.

> A jury trial would inevitably bring a good deal more formality to the juvenile court without giving a youngster a demonstrably better fact-finding process than trial before a judge.
>
> A jury of peers is a protection to both the public and the individual from authority and judicial whim. Peers have a degree of sympathy, they can relate to the accused and understand in some measure his idiom and his world. But children are children's peers, and children can't be tried by a jury of children. Yet adults can't understand long hair, and teeny-bop talk, and the driving fear of being left out, and the perplexing problem of identity for a changing body with a changing mind in a changing world. Adults can be taken in by giving a hoodlum a suit, a tie, and a crew cut, and adults can be put out by the normal rebellion of children striving for independence. Possibly judges who are in constant touch with juveniles come closest to being their peers—if empathy is peerage. And in a court of equity, from which the juvenile courts have evolved it was thought that: *where remedies were*

needed beyond law's rigidities, justice can better come from judges than from juries.

What appellants here seek is not a trial by jury in the sense that this device has been known traditionally in the law. Rather, appellants are seeking to replace the juvenile court judge, who has a special expertise in determining both the existence of delinquency and the propriety of making a finding of delinquency with a jury made up of the peers of the parents of the juveniles. At a time when even the expert juvenile judge has a difficulty bridging the generation gap, it seems clear that the introduction of the jury into juvenile cases cannot improve, and, in fact, must damage the juvenile court as a fact-finder or a rehabilitative device.

Were juvenile cases purely criminal matters, the traditional application of constitutional guarantees *in haec verba* might require provision for trial by jury; since the whole basis of the juvenile court acts is, however, to remove the criminalization of the proceedings, the states should be left free to experiment with improved and varied methods of adjudication so long as the procedure does not violate due process concepts of fundamental fairness.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the order of the court below be affirmed.

Respectfully submitted,

JAMES D. CRAWFORD,
Deputy District Attorney for Law,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McKEIVER ET AL. *v.* PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

No. 322. Argued December 10, 1970—Decided June 21, 1971*

The requests of appellants in No. 322 for a jury trial were denied, and they were adjudged juvenile delinquents under Pennsylvania law. The State Supreme Court, while recognizing the applicability to juveniles of certain due process procedural safeguards, held that there is no constitutional right to a jury trial in juvenile court. Appellants argue for a right to a jury trial because they were tried in proceedings "substantially similar to a criminal trial," and note that the press is generally present at the trial and that members of the public also enter the courtroom. Petitioners in No. 128 were adjudged juvenile delinquents in North Carolina, where their jury trial requests were denied and in proceedings where the general public was excluded. *Held:* A trial by jury is not constitutionally required in the adjudicative phase of a state juvenile court delinquency proceeding. Pp. 11—.

438 Pa. 339, 265 A. 2d 350 and 275 N. C. 517, 169 S. E. 2d 879, affirmed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE, concluded that:

1. The applicable due process standard in juvenile proceedings is fundamental fairness, as developed by *In re Gault*, 387 U. S. 1, and *In re Winship*, 397 U. S. 358, which emphasized factfinding procedures, but in our legal system the jury is not a necessary component of accurate factfinding. Pp. 13–14.

2. Despite disappointments, failures, and shortcomings in the juvenile court procedure, a jury trial is not constitutionally required in a juvenile court's adjudicative stage. Pp. 15–20.

---

*Together with No. 128, *In re Burrus et al.*, on certiorari to the Supreme Court of North Carolina.

Syllabus

(a) The Court has not heretofore ruled that all rights constitutionally assured to an adult accused are to be imposed in a juvenile proceeding. Pp. 15–16.

(b) Compelling a jury trial might remake the proceeding into a fully adversary process and effectively end the idealistic prospect of an intimate, informal protective proceeding. P. 16.

(c) Imposing a jury trial on the juvenile court system would not remedy the system's defects and would not greatly strengthen the factfinding function. P. 17.

(d) The States should be free to experiment to achieve the high promise of the juvenile court concept, and they may install a jury system; or a juvenile court judge may use an advisory jury in a particular case. P. 18.

(e) Many States by statute or judicial decision deny a juvenile a right to jury trial, and the great majority that have faced that issue since *Gault*, *supra*, and *Duncan* v. *Louisiana*, 391 U. S. 145, have concluded that the considerations involved in those cases do not compel trial by jury in juvenile court. Pp. 18–20.

(f) Jury trial would entail delay, formality and clamor of the adversary system, and possibly a public trial. P. 20.

(g) Equating the adjudicative phase of the juvenile proceeding with a criminal trial ignores the aspects of fairness, concern, sympathy, and paternal attention inherent in the juvenile court system. P. 21.

MR. JUSTICE BRENNAN concluded that:

Due process in juvenile delinquency proceedings, which are not "criminal prosecutions," does not require the States to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve. In the juvenile context, those interests may be adequately protected by allowing accused individuals to bring the community's attention to bear upon their trials. Since Pennsylvania has no statutory bar to public juvenile trials, and since no claim is made that members of the public were excluded over appellants' objections, the judgment in No. 322 should be affirmed. Pp. 1–3.

MR. JUSTICE HARLAN concurred in the judgments in these cases on the ground that criminal jury trials are not constitutionally required of the States, either by the Sixth Amendment or by due process. P. 2.

Syllabus

BLACKMUN, J., announced the Court's judgments and delivered an opinion in which BURGER, C. J., and STEWART and WHITE, JJ., joined. WHITE, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in No. 322 and dissenting in No. 128. HARLAN, J., filed an opinion concurring in the judgments. DOUGLAS, J., filed a dissenting opinion, in which BLACK and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and Edward Terry, Appellants, v. State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.
In re Barbara Burrus et al., Petitioners.	On Writ of Certiorari to the Supreme Court of North Carolina.

[June 21, 1971]

MR. JUSTICE BLACKMUN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE WHITE join.

These cases present the narrow but precise issue whether the Due Process Clause of the Fourteenth Amendment assures the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding.

I

The issue arises understandably, for the Court in a series of cases already has emphasized due process factors protective of the juvenile:

1. *Haley* v. *Ohio*, 332 U. S. 596 (1948), concerned the admissibility of a confession taken from a 15-year-old boy on trial for first-degree murder. It was held that, upon the facts there developed, the Due Process Clause barred the use of the confession. MR. JUSTICE DOUGLAS, in an opinion in which three other Justices joined, said, "Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." 332 U. S., at 601.

2. *Gallegos* v. *Colorado*, 370 U. S. 49 (1962), where a 14-year-old was on trial, is to the same effect.

3. *Kent* v. *United States*, 383 U. S. 541 (1966), concerned a 16-year-old charged with housebreaking, robbery, and rape in the District of Columbia. The issue was the propriety of the juvenile court's waiver of jurisdiction "after full investigation," as permitted by the applicable statute. It was emphasized that the latitude the court possessed within which to determine whether it should retain or waive jurisdiction "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'" 383 U. S., at 553.

4. *In re Gault*, 387 U. S. 1 (1967), concerned a 15-year-old, already on probation, committed in Arizona as a delinquent after being apprehended upon a complaint of lewd remarks by telephone. Mr. Justice Fortas, in writing for the Court, reviewed the cases just cited and observed,

> "Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U. S., at 13.

The Court focused on " the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution" and, as to this, said that "there appears to be little current dissent from the proposition that the Due Process Clause has a role to play." P. 13. *Kent* was adhered to: "We reiterate this view, here in connection with the juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause

of the Fourteenth Amendment of our Constitution." Pp. 30–31. Due process, in that proceeding, was held to embrace adequate written notice; advice as to the right to counsel, retained or appointed; confrontation; and cross-examination. The privilege against self-incrimination was also held available to the juvenile. The Court refrained from deciding whether a State must provide appellate review in juvenile cases or a transcript or recording of the hearings.

5. *DeBacker* v. *Brainard*, 396 U. S. 28 (1969), presented, by state habeas corpus, a challenge to a Nebraska statute providing that juvenile court hearings "shall be conducted by the judge without a jury in an informal manner." However, because that appellant's hearing had antedated the decisions in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), and because *Duncan* and *Bloom* had been given only prospective application by *DeStefano* v. *Woods*, 392 U. S. 631 (1968), DeBacker's case was deemed an inappropriate one for resolution of the jury trial issue. His appeal was therefore dismissed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, in separate dissents, took the position that a juvenile is entitled to a jury trial at the adjudicative stage. MR. JUSTICE BLACK described this as "a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world," 396 U. S., at 34, and MR. JUSTICE DOUGLAS described it as a right required by the Sixth and Fourteenth Amendments "where the delinquency charged is an offense that, if the person charged were an adult, would be a crime triable by jury." 396 U. S., at 35.

6. *In re Winship*, 397 U. S. 358 (1970), concerned a 12-year-old charged with delinquency for having taken money from a woman's purse. The Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt

of every fact necessary to constitute the crime with which he is charged," 397 U. S., at 364, and then went on to hold, p. 368, that this standard was applicable, too, "during the adjudicatory stage of a delinquency proceeding."

From these six cases—*Haley*, *Gallegos*, *Kent*, *Gault*, *DeBacker* and *Winship*—it is apparent that:

1. Some of the constitutional requirements attendant upon the state criminal trial have equal application to that part of the state juvenile proceeding that is adjudicative in nature. Among these are the rights to appropriate notice, to counsel, to confrontation and to cross-examination, and the privilege against self-incrimination. Included, also, is the standard of proof beyond a reasonable doubt.

2. The Court, however, has not yet said that *all* rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceeding. Indeed, the Court specifically has refrained from going that far:

> "We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." *Kent*, 383 U. S., at 562; *Gault*, 387 U. S., at 30.

3. The Court, although recognizing the high hopes and aspirations of Judge Julian Mack, the leaders of the Jane Addams School [1] and the other supporters of the juvenile court concept, has also noted the disappointments of the system's performance and experience and the resulting widespread disaffection. *Kent*, 383 U. S.,

[1] See Mr. Justice Fortas' article, Equal Rights—For Whom?, 42 N. Y. U. L. Rev. 401, 406 (1967).

at 555–556; *Gault*, 387 U. S., at 17–19. There have been, at one and the same time, both an appreciation for the juvenile court judge who is devoted, sympathetic, and conscientious, and a disturbed concern about the judge who is untrained and less than fully imbued with an understanding approach to the complex problems of childhood and adolescence. There has been praise for the system and its purposes, and there has been alarm over its defects.

4. The Court has insisted that these successive decisions do not spell the doom of the juvenile court system or even deprive it of its "informality, flexibility or speed." *Winship*, 397 U. S., at 366–367. On the other hand, a concern precisely to the opposite effect was expressed by two dissenters in *Winship*. 397 U. S., at 375–376.

II

With this substantial background already developed, we turn to the facts of the present cases:

No. 322. Joseph McKeiver, then age 16, in May 1968 was charged with robbery, larceny, and receiving stolen goods (felonies under Pennsylvania law, 18 P. S. §§ 4704, 4807, and 4817) as acts of juvenile delinquency. At the time of the adjudication hearing he was represented by counsel.[2] His request for a jury trial was denied and his case was heard by Judge Theodore S. Gutowicz of the Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, Pennsylvania. McKeiver was adjudged a delinquent upon findings that he had violated a law of the Commonwealth. 11 P. S.

[2] At McKeiver's hearing his counsel advised the court that he had never seen McKeiver before and "was just in the middle of interviewing him." The court allowed him five minutes for the interview. Counsel's office, Community Legal Services, however, had been appointed to represent McKeiver five months earlier. Appendix 2.

§ 243 (4)(a). He was placed on probation. On appeal, the Superior Court affirmed without opinion. *In re McKeiver*, 215 Pa. Super. 760, 255 A. 2d 921 (1969).

Edward Terry, then age 15, in January 1969 was charged with assault and battery on a police officer and conspiracy (misdemeanors under Pennsylvania law, 18 P. S. §§ 4708 and 4302) as acts of juvenile delinquency. His counsel's request for a jury trial was denied and his case was heard by Judge Joseph C. Bruno of the same Juvenile Branch of the Court of Common Pleas of Philadelphia County. Terry was adjudged a delinquent on the charges. This followed an adjudication and commitment in the preceding week for an assault on a teacher. He was committed, as he had been on the earlier charge, to the Youth Development Center at Cornwalls Heights. On appeal, the Superior Court affirmed without opinion. *In re Terry*, 215 Pa. Super. 762, 255 A. 2d 922 (1969).

The Supreme Court of Pennsylvania granted leave to appeal in both cases and consolidated them. The single question considered, as phrased by the court, was "whether there is a constitutional right to a jury trial in juvenile court." The answer, one justice dissenting, was in the negative. *In re Terry*, 438 Pa. 339, 265 A. 2d 350 (1970). We noted probable jurisdiction. 399 U. S. 925 (1970).

The details of the McKeiver and Terry offenses are set forth in Justice Roberts' opinion for the Pennsylvania court, 438 Pa., at 341–342 nn. 1 and 2, 265 A. 2d, at 351 nn. 1 and 2, and need not be repeated at any length here. It suffices to say that McKeiver's offense was his participating with 20 or 30 youths who pursued three young teenagers and took 25 cents from them; that McKeiver never before had been arrested and had a record of gainful employment; that the testimony of two of the victims was described by the court as somewhat inconsistent and as "weak"; and that Terry's offense

consisted of hitting a police officer with his fists and with a stick when the officer broke up a boys' fight Terry and others were watching.

No. 128. Barbara Burrus and approximately 45 other black children, ranging in age from 11 to 15 years,[3] were the subjects of juvenile court summonses issued in Hyde County, North Carolina, in January 1969.

The charges arose out of a series of demonstrations in the county in late 1968 by black adults and children protesting school assignments and a school consolidation plan. Petitions were filed by North Carolina state highway patrolmen. Except for one relating to James Lambert Howard, the petitions charged the respective juveniles with wilfully impeding traffic. The charge against Howard was that he wilfully made riotous noise and was disorderly in the O. A. Peay School in Swan Quarter; interrupted and disturbed the school during its regular sessions; and defaced school furniture. The acts so charged are misdemeanors under North Carolina law. N. C. Gen. Stats. §§ 20.174.1, 14–132 (a), 14–273.

The several cases were consolidated into groups for hearing before District Judge Hallett S. Ward, sitting as a juvenile court. The same lawyer appeared for all the juveniles. Over counsel's objection, made in all except two of the cases, the general public was excluded. A request for a jury trial in each case was denied.

The evidence as to the juveniles other than Howard consisted solely of testimony of highway patrolmen. No juvenile took the stand or offered any witness. The testimony was to the effect that on various occasions the juveniles and adults were observed walking along Highway 64 singing, shouting, clapping, and playing basketball. As a result, there was interference with traffic.

[3] In North Carolina juvenile court procedures are provided only for persons under the age of 16. N. C. Gen. Stat. §§ 7A–277 and 7A–278 (1) (1969).

The marchers were asked to leave the paved portion of the highway and they were warned that they were committing a statutory offense. They either refused or left the roadway and immediately returned. The juveniles and participating adults were taken into custody. Juvenile petitions were then filed with respect to those under the age of 16.

The evidence as to Howard was that on the morning of December 5, he was in the office of the principal of the O. A. Peay School with 15 other persons while school was in session and was moving furniture around; that the office was in disarray; that as a result the school closed before noon; and that neither he nor any of the others was a student at the school or authorized to enter the principal's office.

In each case the court found that the juvenile had committed "an act for which an adult may be punished by law." A custody order was entered declaring the juvenile a delinquent "in need of more suitable guardianship" and committing him to the custody of the County Department of Public Welfare for placement in a suitable institution "until such time as the Board of Juvenile Correction or the Superintendent of said institution may determine, not inconsistent with the laws of this State." The court, however, suspended these commitments and placed each juvenile on probation for either one or two years conditioned upon his violating none of the State's laws, upon his reporting monthly to the County Department of Welfare, upon his being home by 11 p. m. each evening, and upon his attending a school approved by the Welfare Director. None of the juveniles has been confined on these charges.

On appeal, the cases were consolidated into two groups. The North Carolina Court of Appeals affirmed. *In re Burrus*, 4 N. C. App. 523, 167 S. E. 2d 454 (1969); *In re Shelton*, 5 N. C. App. 487, 168 S. E. 2d 695 (1969).

In its turn the Supreme Court of North Carolina deleted that portion of the order in each case relating to commitment, but otherwise affirmed. *In re Burrus*, 275 N. C. 517, 169 S. E. 2d 879 (1969). Two justices dissented without opinion. We granted certiorari. 397 U. S. 1036 (1970).

III

It is instructive to review, as an illustration, the substance of Justice Roberts' opinion for the Pennsylvania court. He observes, 265 A. 2d, at 352, that "For over sixty-five years the Supreme Court gave no consideration at all to the constitutional problems involved in the juvenile court area"; that *Gault* "is somewhat of a paradox, being both broad and narrow at the same time"; that it "is broad in that it evidences a fundamental and far-reaching disillusionment with the anticipated benefits of the juvenile court system"; that it is narrow because the court enumerated four due process rights which it held applicable in juvenile proceedings, but declined to rule on two other claimed rights, p. 353; that as a consequence the Pennsylvania court was "confronted with a sweeping rationale and a carefully tailored holding"; that the procedural safeguards "*Gault* specifically made applicable to juvenile courts have already caused a significant 'constitutional domestication' of juvenile court proceedings," p. 354; that those safeguards and other rights, including the reasonable doubt standard established by *Winship*, "insure that the juvenile court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation and the impartiality of the tribunal and at the same time informal enough to permit the benefits of the juvenile system to operate" (footnote omitted); that the "proper inquiry, then, is whether the right to a trial by jury is 'fundamental' within the meaning of *Duncan* in the context of a juvenile court which operates with *all* of the

above constitutional safeguards"; and that his court's inquiry turned "upon whether there are elements in the juvenile process which render the right to a trial by jury less essential to the protection of an accused's rights in the juvenile system than in the normal criminal process."

Justice Roberts then concluded that such factors do inhere in the Pennsylvania juvenile system: (1) Although realizing that "faith in the quality of the juvenile bench is not an entirely satisfactory substitute for due process," p. 355, the judges in the juvenile courts "do take a different view of their role than that taken by their counterparts in the criminal courts." (2) While one regrets its inadequacies, p. 355, "the juvenile system has available and utilizes much more fully various diagnostic and rehabilitative services" that are "far superior to those available in the regular criminal process." (3) Although conceding that the post-adjudication process "has in many respects fallen far short of its goals, and its reality is far harsher than its theory," the end result of a declaration of delinquency "*is* significantly different from and less onerous than a finding of criminal guilt" and "we are not yet convinced that the current practices do not contain the seeds from which a truly appropriate system can be brought forth." (4) Finally, "of all the possible due process rights which could be applied in the juvenile courts, the right to trial by jury is the one which would most likely be disruptive of the unique character of the juvenile process." It is the jury trial that "would probably require substantial alteration of the traditional practices." The other procedural rights held applicable to the juvenile process "will give the juvenile sufficient protection" and the addition of the trial by jury "might well destroy the traditional character of juvenile proceedings."

The court concluded, p. 356, that it was confident "that a properly structured and fairly administered juvenile

court system can save our present societal needs without infringing on individual freedoms."

IV

The right to an impartial jury "[i]n all criminal prosecutions" under federal law is guaranteed by the Sixth Amendment. Through the Fourteenth Amendment that requirement has now been imposed upon the States "in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." This is because the Court has said it believes "that trial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968); *Bloom* v. *Illinois*, 391 U. S. 194, 210–211 (1968).

This, of course, does not automatically provide the answer to the present jury trial issue, if for no other reason than that the juvenile court proceeding has not yet been held to be a "criminal prosecution," within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given the civil label. *Kent*, 383 U. S., at 554; *Gault*, 387 U. S., at 17, 49–50; *Winship*, 397 U. S., at 365–366.

Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either "civil" or "criminal." The Court carefully has avoided this wooden approach. Before *Gault* was decided in 1967, the Fifth Amendment's guarantee against self-incrimination had been imposed upon the state criminal trial. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). So, too, had the Sixth Amendment's rights of confrontation and cross-examination. *Pointer* v. *Texas*, 380 U. S. 400 (1965), and *Douglas* v. *Alabama*, 380 U. S. 415 (1965). Yet the Court did not automatically and peremptorily apply those rights to the juvenile proceeding. A reading

of *Gault* reveals the opposite. And the same separate approach to the standard of proof issue is evident from the carefully separated application of the standard, first to the criminal trial, and then to the juvenile proceeding, displayed in *Winship*. 397 U. S., at 361 and 365.

Thus, accepting "the proposition that the Due Process Clause has a role to play," *Gault*, 387 U. S., at 13, our task here with respect to trial by jury, as it was in *Gault* with respect to other claimed rights, "is to ascertain the precise impact of the due process requirement."

V

The Pennsylvania juveniles' basic argument is that they were tried in proceedings "substantially similar to a criminal trial." They say that a delinquency proceeding in their State is initiated by a petition charging a penal code violation in the conclusory language of an indictment; that a juvenile detained prior to trial is held in a building substantially similar to an adult prison; that in Philadelphia juveniles over 16 are, in fact, held in the cells of a prison; that counsel and the prosecution engage in plea bargaining; that motions to suppress are routinely heard and decided; that the usual rules of evidence are applied; that the customary common law defenses are available; that the press is generally admitted in the Philadelphia juvenile courtrooms; that members of the public enter the room; that arrest and prior record may be reported by the press (from police sources, however, rather than from the juvenile court records); that, once adjudged delinquent, a juvenile may be confined until his majority in what amounts to a prison (see *In re Bethea*, 215 Pa. Super. 75, 76, 257 A. 2d 368, 369 (1969), describing the state correctional institution at Camp Hill as a "maximum security prison for adjudged delinquents and youthful criminal offenders");

and that the stigma attached upon delinquency adjudication approximates that resulting from conviction in an adult criminal proceeding.

The North Carolina juveniles particularly urge that the requirement of a jury trial would not operate to deny the supposed benefits of the juvenile court system; that the system's primary benefits are its discretionary intake procedure permitting disposition short of adjudication, and its flexible sentencing permitting emphasis on rehabilitation; that realization of these benefits does not depend upon dispensing with the jury; that adjudication of factual issues on the one hand and disposition of the case on the other are very different matters with very different purposes; that the purpose of the former is indistinguishable from that of the criminal trial; that the jury trial provides an independent protective factor; that experience has shown that jury trials in juvenile courts are manageable; that no reason exists why protection traditionally accorded in criminal proceedings should be denied young people subject to involuntary incarceration for lengthy periods; and that the juvenile courts deserve healthy public scrutiny.

VI

All the litigants here agree that the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness. As that standard was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. But one cannot say that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been, for example, in

equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have they been generally used in military trials. In *Duncan* the Court stated, "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." 391 U. S., at 158. In *DeStefano*, for this reason and others, the Court refrained from retrospective application of *Duncan*, an action it surely would have not taken had it felt that the integrity of the result was seriously at issue. And in *Williams* v. *Florida*, 399 U. S. 78 (1970), the Court saw no particular magic in a 12-man jury for a criminal case, thus revealing that even jury concepts themselves are not inflexible.

We must recognize, as the Court has recognized before, that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized. The devastating commentary upon the system's failures as a whole, contained in the Task Force Report: Juvenile Delinquency and Youth Crime (President's Commission on Law Enforcement and the Administration of Justice (1967)), pp. 7–9, reveals the depth of disappointment in what has been accomplished. Too often the juvenile court judge falls far short of that stalwart, protective and communicating figure the system envisaged.[4] The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alter-

[4] "A recent study of juvenile court judges . . . revealed that half had not received undergraduate degrees; a fifth had received no college education at all; a fifth were not members of the bar." Task Force Report, p. 7.

natives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.[8]

The Task Force Report, however, also said, page 7, "To say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest."

Despite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. We so conclude for a number of reasons:

1. The Court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that

---

[8] "What emerges, then, is this: In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique. In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal. In theory the court was to treat children guilty of criminal acts in noncriminal ways. In fact it labels truants and runaways as junior criminals.

"In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods." Task Force Report, p. 9.

all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding. What was done in *Gault* and in *Winship* is aptly described in *Commonwealth* v. *Johnson*, 211 Pa. Super. 62, 74, 234 A. 2d 9, 15 (1967):

> "It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend [pointed out in *Kent*, 383 U.S., at 556] whereby 'the child receives the worst of both worlds . . . .'"

2. There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.

3. The Task Force Report, although concededly pre-*Gault*, is notable for its not making any recommendation that the jury trial be imposed upon the juvenile court system. This is so despite its vivid description of the system's deficiencies and disappointments. Had the Commission deemed this vital to the integrity of the juvenile process, or to the handling of juveniles, surely a recommendation or suggestion to this effect would have appeared. The intimations, instead, are quite the other way. Task Force Report, 38. Further, it expressly recommends against abandonment of the system and against the return of the juvenile to the criminal courts.[6]

---

[6] "Nevertheless, study of the juvenile courts does not necessarily lead to the conclusion that the time has come to jettison the experiment and remand the disposition of children charged with crime to the criminal courts of the country. As trying as are the problems of the juvenile courts, the problems of the criminal courts, particu-

4. The Court specifically has recognized by dictum that a jury is not a necessary part even of every criminal process that is fair and equitable. *Duncan* v. *Louisiana*, 391 U. S., at 149–150 n. 14, and, at 158.

5. The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.

---

larly those of the lower courts, which would fall heir to much of the juvenile court jurisdiction, are even graver; and the ideal of separate treatment of children is still worth pursuing. What is required is rather a revised philosophy of the juvenile court based on the recognition that in the past our reach exceeded our grasp. The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment. But neither should it be allowed to outrun reality. The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitating offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with threatening conduct is nonetheless protection of the community. The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it." Task Force Report, p. 9.

6. The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania petitioners here, that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States further to experiment and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial. The States, indeed, must go forward. If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation.

7. Of course there have been abuses. The Task Force Report has noted them. We refrain from saying at this point that those abuses are of constitutional dimension. They relate to the lack of resources and of dedication rather than to inherent unfairness.

8. There is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury.

9. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder* v. *Massachusetts*, 291 U. S.

97, 105 (1934)." *Leland* v. *Oregon*, 343 U. S. 790, 798 (1952). It therefore is of more than passing interest that at least 29 States and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these.[7] The same result is achieved in other States by judicial decision.[8] In 10 States statutes provide for a jury trial under certain circumstances.[9]

---

[7] Ala. Code Tit. 13, § 369 (1958); Alaska Stat. § 47.10.070 (1970 Supp.); Ariz. Rev. Stat. Ann. § 8–229 (1956); Ark. Stat. Ann. § 45–206 (1964 Repl.); Del. Code Ann. Tit. 10, § 1175 (1968 Supp.); Fla. Stat. Ann. § 39.09 (2) (1961); Ga. Code Ann. § 24–2420 (1970 Supp.); Hawaii Rev. Stat. § 571–41 (1968); Idaho Code § 16–1813 (1969 Supp.); Ind. Stat. Ann. § 9–3215 (1957 Supp.); Iowa Code Ann. § 232.27 (1969); Ky. Rev. Stat. § 208.060 (1962); La. Rev. Stat. § 13:1579 (1968); Minn. Stat. Ann. § 260.155 sub. 1. (1971); Miss. Code Ann. § 7185–08 (1942); Vernon's Ann. Mo. Stat. § 211.171 (6) (1962) (equity practice controls); Neb. Rev. Stat. § 43–206.03 (2) (1968 Reissue); Nev. Rev. Stat. § 62.190 (3) (1963); N. J. Stat. Ann. 2A:4–35 (1952); McKinney's Consol. Laws N. Y., Family Court Act §§ 164 and 165 and Civ. Prac. Law and Rules § 4101; N. C. Gen. Stats. § 7A–285 (1969); N. D. Cent. Code § 27–16–18 (1960); Page's Ohio Rev. Code Ann. § 2151.35 (1968); Ore. Rev. Stat. § 419.498 (1) (1968); Purdon's Pa. Stat. Ann., Tit. 11, § 247 (1965); Code of Laws S. C. § 15.1095.19 (1970 Supp.); Utah Code Ann. § 55–10–94 (1969 Supp.); Vt. Stat. Ann., Tit. 33, § 651 (a) (1970 Supp.); Rev. Code Wash. Ann. § 13.04.030; D. C. Code § 16–2316 (a) (Supp. 1971).

[8] *In re Daedler*, 194 Cal. 320, 228 P. 467 (1924); *Cinque* v. *Boyd*, 99 Conn. 70, 121 A. 678 (1923); *In re Fletcher*, 251 Md. 520, 248 A. 2d 364 (1968); *Commonwealth* v. *Page*, 339 Mass. 313, 316, 159 N. E. 2d 82, 85 (1959); *In re Perham*, 104 N. H. 276, 184 A. 2d 449 (1962).

[9] Colo. Rev. Stat. Ann. § 37–8–2 (1963); Kans. Stat. Ann. § 38–808 (1969 Supp.); Mich. Stat. Ann. § 27.3178 (598.17) (1962); Mont. Rev. Codes Ann. § 10–604.1 (1969 Supp.); Okla. Stat. Ann. Tit. 10, § 1110 (1970 Supp.); S. D. Comp. Laws § 26–8–31 (1967); Vernon's Tex. Civ. Stat. Art. 2338–1, § 13 (b) (1970 Supp.); W. Va. Code Ann. § 49–5–6– (1966); Wis. Stat. Ann. § 48.25 (2) (1967); Wyo. Stat. Ann. § 14–108 (c) (1965).

10. Since *Gault* and since *Duncan* the great majority of States, in addition to Pennsylvania and North Carolina, that have faced the issue have concluded that the considerations that led to the result in those two cases do not compel trial by jury in the juvenile court. *In re Fucini*, 44 Ill. 2d 305, 255 N. E. 2d 380 (1970); *Bible* v. *State*, 254 N. E. 2d 319 (Ind. 1970); *Dryden* v. *Commonwealth*, 435 S. W. 2d 457 (Ky. 1968); *In re Johnson*, 254 Md. 517, 255 A. 2d 419 (1969); *Hopkins* v. *Youth Court*, 227 S. 2d 282 (Miss. 1969); *In re J. W.*, 106 N. J. Super. 129, 254 A. 2d 334 (1969); *In re D.*, 27 N. Y. 2d 90, 261 N. E. 2d 627 (1970); *In re Agler*, 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969); *In re Turner*, 253 Oreg. 235, 453 P. 2d 910 (1969). See *In re Estes*, 73 Wash. 2d 263, 438 P. 2d 205 (1968); *In re Geiger*, 184 Neb. 581, 169 N. W. 2d 431 (1969). To the contrary are *Peyton* v. *Nord*, 78 N. Mex. 717, 437 P. 2d 716 (1968), and, semble, *Nieves* v. *United States*, 280 F. Supp. 994 (SDNY 1968).

11. Stopping short of proposing the jury trial for juvenile proceedings are the Uniform Juvenile Court Act, § 24 (a), approved in July 1968 by the National Conference of Commissioners on Uniform State Laws; the Standard Juvenile Court Act, Article V, § 19, proposed by the National Council on Crime and Delinquency (see W. Sheridan, Standards for Juvenile and Family Courts 73 (1968)); and the Legislative Guide for Drafting Family and Juvenile Court Acts § 29 (a) (1969) (issued by the Children's Bureau, Social and Rehabilitation Service, United States Department of H. E. W.).

12. If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality and the clamor of the adversary system and, possibly, the public trial. It is of interest that these very factors were stressed by the District Committee of the Senate

when, through Senator Tydings, it recommended, and Congress then approved, as a provision in the District of Columbia Crime Bill, the abolition of the jury trial in the juvenile court. S. Rep. No. 91–620, 91st Cong., 1st Sess., 1969, pp. 13–14.

13. Finally, the arguments advanced by the juveniles here are, of course, the identical arugments that underlie the demand for the jury trial for criminal proceedings. The arguments necessarily equate the juvenile proceeding—or at least the adjudicative phase of it—with the criminal trial. Whether they should be so equated is our issue. Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and Edward Terry, Appellants, v. State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.
In re Barbara Burrus et al., Petitioners.	On Writ of Certiorari to the Supreme Court of North Carolina.

322

128

[June 21, 1971]

MR. JUSTICE WHITE, concurring.

Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge. Nevertheless, the consequences of criminal guilt are so severe that the Constitution mandates a jury to prevent abuses of official power by insuring, where demanded, community participation in imposing serious deprivations of liberty and to provide a hedge against corrupt, biased, or political justice. We have not, however, considered the juvenile case a criminal proceeding within the meaning of the Sixth Amendment and hence automatically subject to all of the restrictions normally applicable in criminal cases. The question here is one of due process of law and I join the Court's opinion holding that the States are not required by that clause to afford jury trials in juvenile courts where juveniles are charged with acts.

The criminal law proceeds on the theory that defendants have a will and are responsible for their actions. A finding of guilt establishes that they have chosen to engage in conduct so reprehensible and injurious to others

that they must be punished to deter them and others from crime. Guilty defendants are considered blameworthy; they are branded and treated as such, however much the State also pursues rehabilitative ends in the criminal justice system.

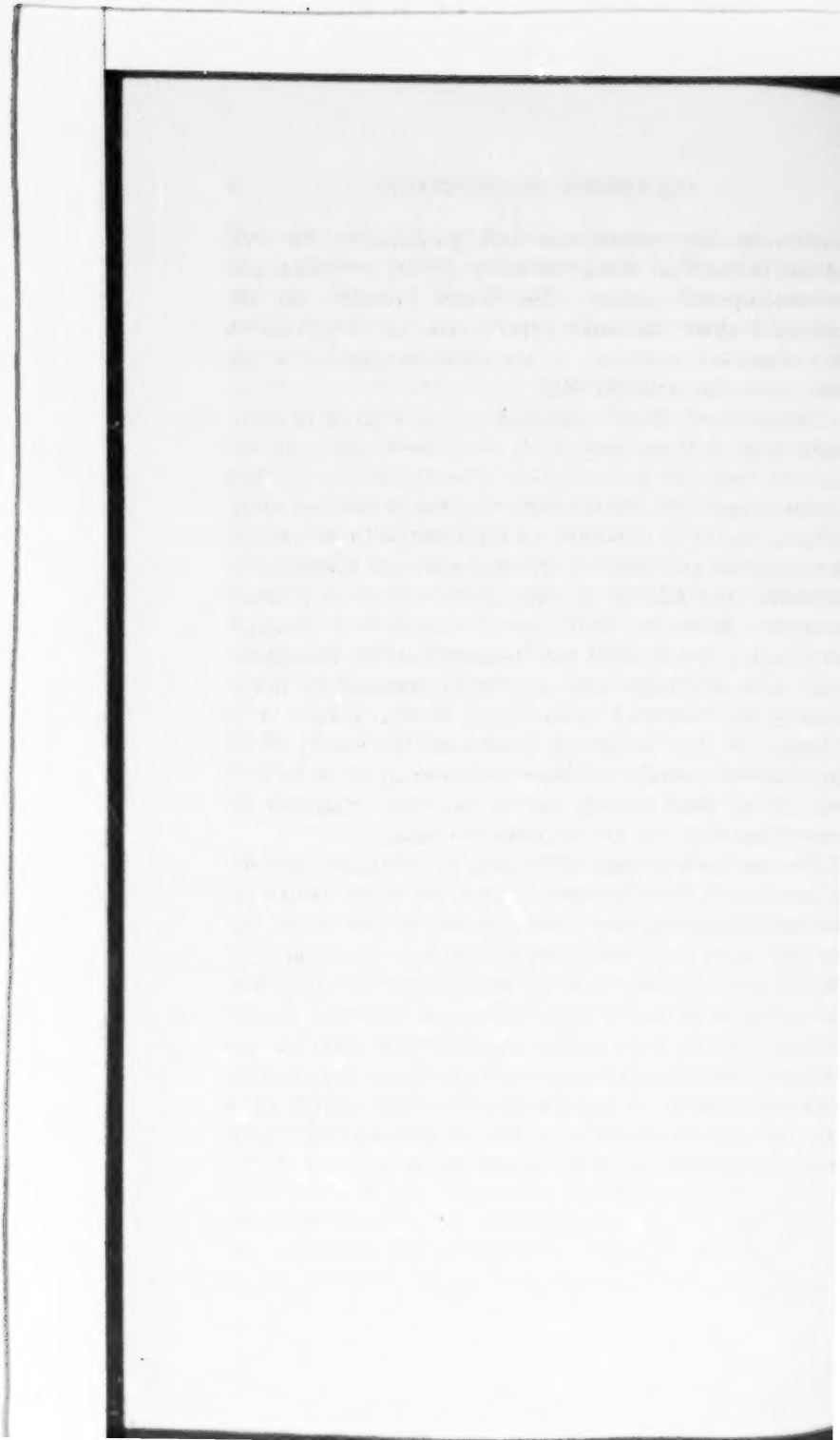
For the most part, the juvenile justice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. A typical disposition in the juvenile court where delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is the authorization for custody until 21 any measure of the seriousness of the particular act which the juvenile has performed.

Against this background and in light of the distinctive purpose of requiring juries in criminal cases, I am satisfied with the Court's holding. To the extent that the jury is a buffer to the corrupt or overzealous prosecutor in the criminal law system, the distinctive intake policies and procedures of the juvenile court system to a great extent obviate this important function of the jury. As for the necessity to guard against judicial bias, a system

eschewing blameworthiness and punishment for evil choice is itself an operative force against prejudice and short-tempered justice. Nor where juveniles are involved is there the same opportunity for corruption to the juvenile's detriment or the same temptation to use the courts for political ends.

Not only are those risks that mandate juries in criminal cases of lesser magnitude in juvenile court adjudications, but the consequences of adjudication are less severe than those flowing from verdicts of criminal guilt. This is plainly so in theory, and in practice there remains a substantial gulf between criminal guilt and delinquency, whatever the failings of the juvenile court in practice may be. Moreover, to the extent that current unhappiness with juvenile court performance rests on dissatisfaction with the vague and overbroad grounds for delinquency adjudications, with faulty judicial choice as to disposition after adjudication or with the record of rehabilitative custody, whether institutional or probationary, these shortcomings are in no way mitigated by providing a jury at the adjudicative stage.

For me there remain differences of substance between criminal and juvenile courts. They are quite enough for me to hold that a jury is not required in the latter. Of course, there are strong arguments that juries are desirable when dealing with the young, and States are free to use juries if they choose. They are also free, if they extend criminal court safeguards to juvenile court adjudications, frankly to embrace condemnation, punishment, and deterence as permissible and desirable attributes of the juvenile justice system. But the Due Process Clause neither compels nor invites them to do so.



SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and Edward Terry, Appellants, v. State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.
In re Barbara Burrus et al., Petitioners.	On Writ of Certiorari to the Supreme Court of North Carolina.

322

128

[June 21, 1971]

MR. JUSTICE BRENNAN, concurring in No. 322 and dissenting in No. 128.

I agree with the plurality opinion's conclusion that the proceedings below in these cases were not "criminal prosecutions" within the meaning of the Sixth Amendment. For me, therefore, the question in these cases is whether jury trial is among the "essentials of due process and fair treatment," *In re Gault*, 387 U. S. 1, 30 (1967), required during the adjudication of a charge of delinquency based upon acts which would constitute a crime if engaged in by an adult. See *In re Winship*, 397 U. S. 358, 359, and n. 1 (1970). This does not, however, mean that the interests protected by the Sixth Amendment's guarantee of jury trial in all "criminal prosecutions" are of no importance in the context of these cases. The Sixth Amendment, where applicable, commands that these interests be protected by a particular procedure, that is, trial by jury. The Due Process Clause commands not a particular procedure, but only a result: in my Brother BLACKMUN's words, "fundamental fairness . . . in factfinding." In the context of these and similar juvenile delinquency pro-

ceedings, what this means is that the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve.[1]

In my view, therefore, the due process question cannot be decided upon the basis of general characteristics of juvenile proceedings, but only in terms of the adequacy of a particular state procedure to "protect the [juvenile] from oppression by the Government," *Singer* v. *United States*, 380 U. S. 24, 31 (1965), and to protect him against "the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968).

Examined in this light, I find no defect in the Pennsylvania cases before us. The availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury that hears his case. To some extent, however, a similar protection may be obtained when an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining if necessary executive redress through the medium of public indignation. Of course the Constitution, in the context of adult criminal trials, has rejected the notion that public trial is an adequate substitute for trial by jury in serious cases. But in the context of juvenile delinquency proceedings, I cannot say that it is beyond the competence of a State

[1] "A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems." *Duncan* v. *Louisiana*, 391 U. S. 145, 150 n. 14 (1968). This conclusion is, of course, inescapable in light of our decisions that petty criminal offenses may be tried without a jury notwithstanding the defendant's request. *E. g.*, *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937).

to conclude that juveniles who fear that delinquency proceedings will mask judicial oppression may obtain adequate protection by focusing community attention upon the trial of their cases. For however much the juvenile system may have failed in practice, its very existence as an ostensibly beneficient and noncriminal process for the care and guidance of young persons demonstrates the existence of the community's sympathy and concern for the young. Juveniles able to bring the community's attention to bear upon their trials may therefore draw upon a reservoir of public concern unavailable to the adult criminal defendant. In the Pennsylvania cases before us, there appears to be no statutory ban upon admission of the public to juvenile trials.[2] Appellants themselves, without contradiction, assert that "the press is generally admitted" to juvenile delinquency proceedings in Philadelphia.[3] Most important, the record in these cases is bare of any indication that any person whom appellants sought to have admitted to the courtroom was excluded. In these circumstances, I agree that the judgment in No. 322 must be affirmed.

The North Carolina cases, however, present a different situation. North Carolina law either permits or requires exclusion of the general public from juvenile trials.[4] In

---

[2] The generally applicable statute, Pa. Stat. Ann. § 11–245 (1965), merely provides that juvenile proceedings shall be "separate" from regular court business. Pa. Stat. Ann. § 11–269–402 (1970), requiring exclusion of the general public from juvenile hearings, applies only to Allegheny County. Both of the instant cases were tried in Philadelphia County.

[3] "The judges of the Philadelphia Juvenile Court exercise varying degrees of control over admission to the courtroom, but the press is generally admitted . . . ." Brief for Appellants, at 9 n. 9.

[4] N. C. Gen. Stat. § 110–24 (19—), as in force at the time of these trials, appears on its face to permit but not require such exclusion, as does the identical language of the present statute, N. C. Gen. Stat. § 7A–285 (19—). The North Carolina Supreme Court in the present

the cases before us, the trial judge "ordered the general public excluded from the hearing room and stated that only officers of the court, the juveniles, their parents or guardians, their attorney and witnesses would be present for the hearing." *In re Burrus*, 4 N. C. App. 523, —, 167 S. E. 2d 254, — (1969), notwithstanding petitioners' repeated demand for a public hearing. The cases themselves, which arise out of a series of demonstrations by black adults and juveniles who believed that the Hyde County, North Carolina, school system unlawfully discriminated against black schoolchildren, present a paradigm of the circumstances in which there may be a substantial "temptation to use the courts for political ends." Opinion of MR. JUSTICE WHITE, *ante*, at [3]. And finally, neither the opinions supporting the judgment nor the respondent in No. 128 has pointed to any feature of North Carolina's juvenile proceedings that could substitute for public or jury trial in protecting the petitioners against misuse of the judicial process. Cf. *Duncan* v. *Louisiana*, 391 U. S. 145, 188, 193 (1968) (HARLAN, J., dissenting) (availability of resort to "the political process" is an alternative permitting States to dispense with jury trials). Accordingly, I would reverse the judgment in No. 128.

---

cases has read these statutes as a legislative determination "that a public hearing is [not] in the best interest of the youthful offender." *In re Burrus*, — N. C. —, —, 169 S. E. 2d 879, — (1969).

SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and Edward Terry, Appellants, v. State of Pennsylvania	On Appeal From the Supreme Court of Pennsylvania, Eastern District.
In re Barbara Burrus et al., Petitioners.	On Writ of Certiorari to the Supreme Court of North Carolina.

322

128

[June 21, 1971]

MR. JUSTICE HARLAN, concurring in the judgments.

If I felt myself constrained to follow *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which extended the Sixth Amendment right of jury trial to the States, I would have great difficulty, upon the premise seemingly accepted in my Brother BLACKMUN's opinion, in holding that the jury trial right does not extend to state juvenile proceedings. That premise is that juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials. But see my concurring and dissenting opinion in *In re Gault*, 387 U. S. 1, 65 (1967). If that premise be correct, then I do not see why, given *Duncan*, juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose. When that time comes I would have no difficulty in agreeing with my Brother BLACKMUN, and indeed with my Brother WHITE, the author of *Duncan*, that juvenile delinquency proceedings are beyond the pale of *Duncan*.

I concur in the judgments in these cases however, on the ground that criminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process. See my dissenting opinion in *Duncan* and my concurring opinion in *Williams* v. *Florida*, 399 U. S. 78, 118–119 (1970).

SUPREME COURT OF THE UNITED STATES

Nos. 322 AND 128.—OCTOBER TERM, 1970

Joseph McKeiver and Edward Terry, Appellants, v. State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.
322	
In re Barbara Burrus et al., Petitioners.	On Writ of Certiorari to the Supreme Court of North Carolina.
128	

[June 21, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE MARSHALL concur, dissenting.

These cases from Pennsylvania and North Carolina present the issue of the right to a jury trial for offenders charged in juvenile court and facing a possible incarceration until they reach their majority. I believe the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.

In the Pennsylvania cases one of the appellants was charged with robbery (18 Pa. Stat. Ann. § 4704), larceny (18 Pa. Stat. Ann. § 4807), and receiving stolen goods (18 Pa. Stat. Ann. § 4817) as acts of juvenile delinquency. 11 Pa. Stat. Ann. § 246. He was found a delinquent and placed on probation. The other appellant was charged with assault and battery on a police officer (18 Pa. Stat. Ann. § 4708) and conspiracy (18 Pa. Stat. Ann. § 4302) as acts of juvenile delinquency. On a finding of delinquency he was committed to a youth center. Despite the fact that the two appellants, aged 15 and 16, would face potential incarceration until their majority, 11 Pa. Stat. Ann. § 250, they were denied a jury trial.

In the North Carolina cases petitioners are students, from 11 to 15 years of age, who were charged under one of three criminal statutes: (1) "disorderly conduct" in a public building, G. S. 14–132; (2) "wilful" interruption or disturbance of a public or private school, G. S. 14–273; or (3) obstructing the flow of traffic on a highway or street, G. S. 20–174.1.

Conviction for each of these crimes would subject a person, whether juvenile or adult, to imprisonment in a state institution. In the case of these students the possible term was six to 10 years; it would be computed for the period until an individual reached the age of 21. Each asked for a jury trial which was denied. The trial judge stated that the hearings were juvenile hearings, not criminal trials. But the issue in each case was whether they had violated a state criminal law. The trial judge found in each case that the juvenile had committed "an act for which an adult may be punished by law" and held in each case that the acts of the juvenile violated one of the criminal statutes cited above. The trial judge thereupon ordered each juvenile to be committed to the state institution for the care of delinquents and then placed each on probation for terms from 12 to 24 months.

We held in *In re Gault*, 387 U. S. 1, 13, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." As we noted in that case, the Juvenile Court movement was designed to avoid procedures to ascertain whether the child was "guilty" or "innocent" but to bring to bear on these problems a "clinical" approach. *Id.*, at 15, 16. It is of course not our task to determine as a matter of policy whether a "clinical" or "punitive" approach to these problems should be taken by the States. But where a State uses its juvenile court proceedings to prosecute a juvenile for a criminal act and to order "confinement" until the child reaches 21 years of age or where the child at the threshold of the

proceedings faces that prospect, then he is entitled to the same procedural protection as an adult. As MR. JUSTICE BLACK said in *In re Gault, supra,* at 61 (concurring):

> "Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, because they are children, be denied these same constitutional safeguards."

Just as courts have sometimes confused delinquency with crime, so have law enforcement officials treated juveniles not as delinquents but as criminals. As noted in the President's Crime Commission Report:

> "In 1965, over 100,000 juveniles were confined in adult institutions. Presumably most of them were there because no separate juvenile detention facilities existed. Nonetheless it is clearly undesirable that juveniles be confined with adults."

President's Commission on Law Enforcement, Challenge of Crime 179 (1967). Even when not incarcerated with adults the situation may be no better. One Pennsylvania correctional institution for juveniles is a brick building with barred windows, locked steel doors, a cyclone fence topped with barbed wire and guard towers. A former juvenile judge described it as "a maximum security prison for adjudged delinquents." *In re Bethea,* 215 Pa. Super. 75, 76, 257 A. 2d 368, 369.

In the present cases imprisonment or confinement up to 10 years was possible for one child and each faced at least a possible five-year incarceration. No adult could be denied a jury trial in those circumstances. *Duncan* v. *Louisiana*, 391 U. S. 145, 162. The Fourteenth Amendment which makes trial by jury provided in the Sixth Amendment applicable to States speaks of denial of rights to "any person," not denial of rights to "any adult person"; and we have held indeed that where a juvenile is charged with an act that would constitute a crime if committed by an adult, he is entitled to trial by jury with proof beyond a reasonable doubt. *In re Winship*, 397 U. S. 358.

In *De Backer* v. *Brainard*, 396 U. S. 28, 33 MR. JUSTICE BLACK and I dissented from a refusal to grant a juvenile, who was charged with forgery, a jury trial merely because the case was tried before *Duncan* v. *Louisiana*, 391 U. S. 145 was decided. MR. JUSTICE BLACK, after noting that a juvenile being charged with a criminal act was entitled to certain constitutional safeguards, *viz.* notice of the issues, benefit of counsel, protection against compulsory self-incrimination, and confrontation of the witnesses against him, added:

> "I can see no basis whatsoever in the language of the Constitution for allowing persons like appellant the benefit of those rights and yet denying them a jury trial, a right which is surely one of the fundamental aspects of criminal justice in the English-speaking world." 396 U. S., at 34.

I added that by reason of the Sixth and Fourteenth Amendments the juvenile is entitled to a jury trial:

> ". . . as a matter of right where the delinquency charged is an offense that, if the person were an adult, would be a crime triable by jury. Such is

this case, for behind the facade of delinquency is the crime of forgery." *Id.*, at 35.

Practical aspects of these problems are urged against allowing a jury trial in these cases.* They have been answered by Judge De Ciantis of the Family Court of Providence, Rhode Island, in a case entitled In the Matter of McCloud, decided January 15, 1971. A juvenile was charged with the rape of a 17-year-old female and Judge De Ciantis granted a motion for a jury trial in an opinion, a part of which I have attached as an appendix to this dissent. He there concludes that "the real traumatic"

*The Public Defender Service for the District of Columbia and the Neighborhood Legal Services Program of Washington, D. C., have filed a brief *amicus* in which the results of a survey of jury trials in delinquency cases in the 10 States requiring jury trials plus the District of Columbia are set forth. The cities selected were mostly large metropolitan areas. Thirty juvenile courts processing about 75,000 juvenile cases a year were canvassed:

". . . we discovered that during the past five and a half years, in 22 out of 26 courts surveyed, cumulative requests for jury trials totaled 15 or less. In the remaining five courts in our sample, statistics were unavailable. During the same period, in 26 out of 29 courts the cumulative number of jury trials actually held numbered 15 or less, with statistics unavailable for two courts in our sample. For example, in Tulsa, Oklahoma, counsel is present in 100% of delinquency cases, but only one jury trial has been requested and held during the past five and one-half years. In the Juvenile Court of Fort Worth, Texas, counsel is also present in 100% of the cases, and only two jury trials have been requested since 1967. The Juvenile Court in Detroit, Michigan, reports that counsel is appointed in 70–80% of its delinquency cases, but thus far in 1970, it has had only four requests for a jury. Between 1965 and 1969 requests for juries were reported as 'very few.'

"In only four juvenile courts in our sample has there clearly been a total during the past five and one-half years of more than 15 jury trial requests and/or more than 15 such trials held."

The four courts showing more than 15 requests for jury trials were Denver, Houston, Milwaukee, and Washington, D. C.

experience of incarceration without due process is "the feeling of being deprived of basic rights." He adds:

> "The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. Many of the children who come before the court come from broken homes, from the ghettos; they often suffer from low self-esteem; and their behavior is frequently a symptom of their own feelings of inadequacy. Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process."

Judge De Ciantis goes on to say that "Trial by jury will provide the child with a safeguard against being prejudged" by a judge who may well be prejudiced by reports already submitted to him by the police or case-workers in the case. Indeed the child, the same as the adult, is in the category of those described in the Magna Carta:

> "No freeman may be . . . imprisoned . . . except by the lawful judgment of his peers, or by the law of the land."

These cases should be remanded for trial by jury on the criminal charges filed against these youngsters.

APPENDIX TO DISSENT IN NO. 128
(DOUGLAS, J.)

De Ciantis, J.: The defendant, who will hereinafter be referred to as a juvenile, on the sixth day of September, 1969, was charged with Rape upon a female child, seventeen years old, in violation of Title 11, Chapter 37, Section 1, of the General Laws of 1956. . . .

TRAUMA

The fact is that the procedures which are now followed in juvenile cases are far more traumatic than the potential experience of a jury trial. Who can say that a boy who is arrested and handcuffed, placed in a lineup, transported in vehicles designed to convey dangerous criminals, placed in the same kind of a cell as an adult, deprived of his freedom by lodging him in an institution where he is subject to be transferred to the state's prison and in the "hole" has not undergone a traumatic experience?

The experience of a trial with or without a jury is meant to be impressive and meaningful. The fact that a juvenile realizes that his case will be decided by twelve objective citizens would allow the court to retain its meaningfulness without causing any more trauma than a trial before a judge who perhaps has heard other cases involving the same juvenile in the past and may be influenced by those prior contacts. To agree that a jury trial would expose a juvenile to a traumatic experience is to lose sight of the real traumatic experience of incarceration without due process. The real traumatic experience is the feeling of being deprived of basic rights. *In the matter of Reis*,[1] this Court indicated the inadequacies of the procedure under which our court operates. A judge who receives facts of a case from the police and

[1] Reis, 7 CrL 2151 (1970).

approves the filing of a petition based upon those facts may be placed in the untenable position of hearing a charge which he has approved. His duty is to adjudicate on the evidence introduced at the hearing and not be involved in any pre-adjudicatory investigation.

It is contrary to the fundamental principles of due process for the court to be compelled, as it is in this state, to act as a one-man grand jury, then sit in judgment on its own determination arising out of the facts and proceedings which he conducted. This responsibility belongs with a jury.

BACKLOG

An argument has been made that to allow jury trials would cause a great backlog of cases and, ultimately, would impair the functioning of the juvenile court. The fact however is that there is no meaningful evidence that granting the right to jury trials will impair the function of the court. Some states permit jury trials in *all* juvenile court cases; few juries have been demanded, and there is no suggestion from these courts that jury trials have impeded the system of juvenile justice.

In Colorado, where jury trials have been permitted by statute, Judge Theodore Rubin of the Denver Juvenile Court has indicated that jury trials are an important safeguard and that they have not impaired the functioning of the Denver Juvenile Courts. For example, during the first seven months of 1970, the two divisions of the Denver Juvenile Court have had fewer than two dozen jury trials, in both delinquency and dependency-neglect cases. In Michigan, where juveniles are also entitled to a jury trial, Judge Lincoln of the Detroit Juvenile Court indicates that his court has had less than five jury trials in the year 1969 to 1970.

The recent Supreme Court decision of *Williams* v. *Florida*, 90 S. Ct. 1893 (June 22, 1970), which held that the constitutional right to trial by jury in criminal cases

does not require a twelve-member jury, could be implemented to facilitate the transition to jury trials. A jury of less than twelve members would be less cumbersome, less "formal," and less expensive than the regular twelve-member jury, and yet would provide the accused with objective fact-finders.

In fact the very argument of expediency, suggesting "supermarket" or "assembly-line" justice is one of the most forceful arguments in favor of granting jury trials. By granting the juvenile the right to a jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time. It will provide a safeguard against the judge who may be prejudiced against a minority group or who may be prejudiced against the juvenile brought before him because of some past occurrence which was heard by the same judge.

There have been criticisms that juvenile court judges, because of their hearing caseload, do not carefully weigh the evidence in the adjudicatory phase of the proceedings. It is during this phase that the judge must determine whether in fact the evidence has been established beyond a reasonable doubt that the accused committed the acts alleged in the petition. Regardless of the merit of these criticisms they have impaired the belief of the juveniles, of the bar and of the public as to the opportunity for justice in the juvenile court. Granting the juvenile the right to demand that the facts be determined by a jury will strengthen the faith of all concerned parties in the juvenile system. . . .

It is important to note, at this time, a definite side benefit of granting jury trials, *i e.*, an aid to rehabilitation. The child who feels that he has been dealt with fairly and not merely expediently or as speedily as possible will be a better prospect for rehabilitation. Many of the children who come before the court come from broken

homes, from the ghettos; they often suffer from low self-esteem; and their behavior is frequently a symptom of their own feelings of inadequacy. Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process.

PUBLIC TRIAL

Public trial in the judgment of this Court does not affect the juvenile court philosophy.

In re Oliver[2] MR. JUSTICE BLACK reviews the history of the public trial. Its origins are obscure, but it seems to have evolved along with the jury trial guarantee in English common law and was then adopted as a provision of the Federal Constitution as well as by most state constitutions. Among the benefits of a public trial are the following:

> 1. "Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony."
>
> 2. "The spectators learn about their government and acquire confidence in their judicial remedies."
>
> 3. "The knowledge that every *criminal* trial is subject to contemporaneous review in the form of public opinion is an effective restraint on possible abuse of judicial power." (P. 270.)

JUSTICE BLACK has nothing to say on the question of whether a public trial acts as a deterrent to crime, but it is clear that he believes *publicity to improve the quality of criminal justice, both theoretically and practically.*

---

[2] 333 U. S. 257.

As for the juvenile trial issue, he writes:

> "Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice to wholly exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel." (P. 266.)

In fact, the juvenile proceedings as presently conducted are far from secret. Witnesses for the prosecution and for the defense, social workers, court reporters, students, police trainees, probation counselors, and sheriffs are present in the courtroom. Police, the Armed Forces, the Federal Bureau of Investigation obtain information and have access to the police files. There seems no more reason to believe that a jury trial would destroy confidentiality than would witnesses summoned to testify.

The Court also notes the report of the PRESIDENT'S COMMISSION OF LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967), wherein it is stated:

> "A juvenile's adjudication record is required by the law of most jurisdictions to be private and confidential; in practice the confidentiality of those reports is often violated." Furthermore, "[s]tatutory restrictions almost invariably apply only to court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers."

JUDGE'S EXPERTISE

The Court is also aware of the argument that the juvenile court was created to develop judges who were experts in sifting out the real problems behind a juvenile's

breaking the law; therefore, to place the child's fate in the hands of a jury would defeat that purpose. This will, however, continue to leave the final decision of disposition solely with the judge. The role of the jury will be only to ascertain whether the facts, which give the court jurisdiction, have been established beyond a reasonable doubt. The jury will not be concerned with social and psychological factors. These factors, along with prior record, family and educational background, will be considered by the judge during the dispositional phase.

Taking into consideration the social background and other facts, the judge, during the dispositional phase, will determine what disposition is in the best interests of the child and society. It is at this stage that a judge's expertise is most important, and the granting of a jury trial will not prevent the judge from carrying out the basic philosophy of the juvenile court.

Trial by jury will provide the child with a safeguard against being prejudged. The jury clearly will have no business in learning of the social report or any of the other extraneous matter unless properly introduced under the rules of evidence. Due process demands that the trier of facts should not be acquainted with any of the facts of the case or have knowledge of any of the circumstances, whether through officials in his own department or records in his possession. If the accused believes that the judge has read an account of the facts submitted by the police or any other report prior to the adjudicatory hearing and that this may prove prejudicial, he can demand a jury and insure against such knowledge on the part of the trier of the facts.

WAIVER OF JURY TRIAL

Counsel also questions whether a child can waive his right to a jury trial or, in fact, whether a parent or counsel may waive.

When the waiver comes up for hearing, the Court could, at its discretion, either grant or refuse the juvenile's waiver of a jury trial, and/or appoint a guardian or legal counsel to advise the child.

My experience has shown that the greatest percentage of juveniles who appear before the court in felony cases have lived appalling lives due to parental neglect and brutality, lack of normal living conditions, and poverty. This has produced in them a maturity which is normally acquired much later in life. They are generally well aware of their rights in a court of law. However, in those cases where a child clearly needs guidance, the court-appointed guarandian or attorney could explain to him the implications of a waiver. The juvenile's rights and interests would thus be protected every bit as stringently as they are today before he is allowed to plead guilty or not guilty to a complaint. A guilty plea is, after all, a waiver of the right to trial altogether.

Counsel is placed with the responsibility of explaining to the juvenile the significance of guilty and *nolo contendere* pleas, of instructing the juvenile on the prerogative to take the witness stand, and is expected to advise his client in the same manner as he would an adult to stand trial. And now counsel suggests to the Court that counsel is not capable of explaining and waiving the right to a jury trial. The Court fails to see the distinction between this waiver and the absolute waiver, to wit, a guilty plea. Counsel should act in the best interest of his client, even if this may be in conflict with the parents. On a number of occasions this Court has appointed counsel for a juvenile whose parents could not afford to retain private counsel, and where the parents' interests were in conflict with those of the child. This procedure will be continued and the Court will continue to rely on the good judgment of the bar.

The Court could easily require that a waiver of a jury trial be made in person by the juvenile in writing, in

open court, with the consent and approval of the Court and the attorney representing both the juvenile and the state. The judge could ascertain as to whether the juvenile can intelligently waive his right and, if necessary, appoint counsel to advise the youth as to the implications connected with the waiver. This could be accomplished without any difficulty through means presently available to the Court.

JURY OF PEERS

One of the most interesting questions raised is that concerning the right of a juvenile to a trial by his peers. Counsel has suggested that a jury of a juvenile's peers would be composed of other juveniles, that is, a "teenage jury." Webster's Dictionary, Second Edition, 1966, defines a peer as an equal, one of the same rank, quality, value. The word "peers" means nothing more than citizens, *In re Grilli*, 179 N. Y. S. 795, 797. The phrase "judgment of his peers" means at common law, a trial by a jury of twelve men, *State* v. *Simon*, Kan. 752. "Judgment of his peers" is a term expressly borrowed from the Magna Charta, and it means a trial by jury, *Ex parte Wagner*, 58 Okl. Cr. 161. The Declaration of Independence also speaks of the equality of *all* men. Are we now to say that a juvenile is a second-class citizen, not equal to an adult? The Constitution has never been construed to say women must be tried by their peers, to wit, by all-female juries, or Negroes by all-Negro juries.

The only restriction on the makeup of the jury is that there can be no systematic exclusion of those who meet local and federal requirements, in particular, voting qualifications.

The Court notes that presently in some states 18-year-olds can vote. Presumably, if they can vote, they may also serve on juries. Our own legislature has given first

passage to an amendment to the Constitution to permit 18-year-olds to vote. Thus, it is quite possible that we will have teenage jurors sitting in judgment of their so-called "peers."

CRIMINAL PROCEEDING

The argument that the adjudication of delinquency is not the equivalent of criminal process is spurious. This Court has discussed the futility of making distinctions on the basis of labels in prior decisions. Because the legislature dictates that a child who commits a felony shall be called a delinquent does not change the nature of the crime. Murder is murder; robbery is robbery—they are both criminal offenses, not civil, regardless and independent of the age of the doer. . . .

It is noteworthy that in our statute there is not an express statutory provision indicating that the proceedings are civil. Trial by jury in Rhode Island is guaranteed to *all* persons, whether in criminal cases or in civil cases. That right existed prior to the adoption of the Constitution; and certainly whether one is involved in a civil or criminal proceeding of the Family Court in which his "liberty" is to be "taken" "imprisoned" "outlawed" and "banished" he is entitled to a trial by jury. (*Henry* v. *Cherry & Webb*, 30 R. I. 13, at 30).

This Court believes that although the juvenile court was initially created as a social experiment, it has not ceased to be part of the judicial system. In view of the potential loss of liberty at stake in the proceeding, this Court is compelled to accord due process to all the litigants who come before it; and, therefore, all of the provisions of the Bill of Rights, including trial by jury, must prevail.

The Court concludes that the framers of our Constitution never intended to place the power in any one man or official, and take away the "protection of the law from

the rights of an individual." It meant "to secure the blessings of liberty to themselves and posterity." The Constitution was written with the philosophy based upon a composite of all of the most liberal ideas which came down through the centuries. The Magna Charta, the Petition of Rights, the Bill of Rights and the Rules of Common Law; and the keystone is the preservation of individual liberty. All these ideas were carefully inserted in our Constitution.

The juvenile is constitutionally entitled to a jury trial.